Supreme Court, U.S.
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No. 02-

IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

NPC SERVICES INC., EXXON MOBIL CORPORATION, UNITED STATES STEEL CORPORATION, DSM COPOLYMER, INC., SHELL CHEMICAL LP, CROMPTON MANUFACTURING COMPANY, INC., THE DOW CHEMICAL COMPANY, ETHYL CORPORATION, CELANESE AMERICAS CORPORATION, HONEYWELL INTERNATIONAL INC., ROBERT G. BOLGER, J.W. STREET, AND W.L. RAINEY,

Petitioners,

v.

MSOF CORPORATION AND J. PAUL LEBLANC,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioners properly removed this case to federal court under the All Writs Act to protect the integrity of a federal consent decree challenged by respondents' claims.

2. Whether petitioners properly removed this case to federal court under federal-question jurisdiction where respondents' ostensible state-law claims are nothing more than artfully pleaded federal claims.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, petitioners hereby state as follows:

NPC Services, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Exxon Mobil Corporation (successor by merger to Exxon Corporation, and identified as Exxon Corporation and Exxon Chemical Corporation in the caption below) has no parent corporation, and no publicly held company owns 10% or more of its stock.

United States Steel Corporation (f/k/a USX Corporation, f/k/a U.S. Steel Corporation, and identified as USS Chemical Company in the caption below) has no parent corporation, and no publicly held company owns 10% or more of its stock.

DSM Copolymer, Inc. (f/k/a Copolymer Rubber & Chemical Corporation, and identified as such in the caption below) has no parent corporation, and no publicly held company owns 10% or more of its stock.

Crompton Manufacturing Company, Inc. (f/k/a Uniroyal Inc. or Uniroyal Chemical Company, Inc., and identified as Uniroyal Corporation in the caption below) has no parent corporation, and no publicly held company owns 10% or more of its stock.

The Dow Chemical Company (identified as Dow Chemical Company in the caption below) has no parent corporation, and no publicly held company owns 10% or more of its stock.

Ethyl Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Shell Chemical LP (successor in interest to Shell Chemical Company, and identified as such in the caption below) has no parent corporation, but the following publicly held corporations, through subsidiaries or other entities, own a 10% or greater share of Shell Chemical LP: Shell Transport and

Trading Co. PLC, Royal Dutch Petroleum Company, and RBOS, Inc., a subsidiary of the Royal Bank of Scotland.

Celanese Americas Corporation (f/k/a Hoechst Celanese Corporation, f/k/a American Hoechst Corporation, and identified as the latter in the caption below) is wholly owned by Celanese Holding GmbH, a German corporation which in turn is wholly owned by Celanese AG, a German corporation whose stock is traded on the Frankfurt and New York Stock Exchanges.

Honeywell International Inc. (f/k/a AlliedSignal, Inc., f/k/a Allied Chemical Corporation, and identified as the latter in the caption below) has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 2

PERTINENT STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

I. The Fifth Circuit Erred By Holding That Removal Is Unwarranted Here Under The All Writs Act 7

II. The Fifth Circuit Erred By Holding That Removal Is Unwarranted Here Under Federal-Question Jurisdiction 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases

Arco Envtl. Remediation, L.L.C. v. Department of Health & Envtl. Quality of Montana, 213 F.3d 1108 (9th Cir. 2000) 10

Bolin v. Cessna Aircraft Co., 759 F. Supp. 692 (D. Kan. 1991) 10

Bylinski v. City of Allen Park, 169 F.3d 1001 (6th Cir. 1999) 8

Caterpillar Inc. v. Williams, 482 U.S. 386 (1987) 9

Fort Ord Toxics Project, Inc. v. California EPA, 189 F.3d 828 (9th Cir. 1999) 2, 10, 11

Henson v. Ciba-Geigy Corp., 261 F.3d 1065 (11th Cir. 2001), *cert. granted sub. nom Syngenta Crop Protection v. Henson*, 122 S. Ct. 1062 (2002) 1, 8

Hillman v. Webley, 115 F.3d 1461 (10th Cir. 1997) 8

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 9

NAACP v. Metropolitan Council, 144 F.3d 1168 (8th Cir. 1998) 8

Razore v. Tulalip Tribes of Washington, 66 F.3d 236 (9th Cir. 1995) 10

Sable v. General Motors Corp., 90 F.3d 171 (6th Cir. 1996) 8, 9

Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) 7

Syngenta Crop Protection, Inc. v. Henson,
No. 01-757,
cert. granted, 122 S. Ct. 1062 (2002) 1, 2, 6-9, 11

Texas v. Real Parties in Interest,
259 F.3d 387 (5th Cir. 2001) 6-8

United States v. City of New York,
972 F.2d 464 (2d Cir. 1992) 8

Xiong v. Minnesota,
195 F.3d 424 (8th Cir. 1999) 8

Yonkers Racing Corp. v. City of Yonkers,
858 F.2d 855 (2d Cir. 1988) 8, 9

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 ..... 1, 3, 9

28 U.S.C. § 1651 ..... 1, 3, 5-9, 11

28 U.S.C. § 1651(a) 3

42 U.S.C. § 9601 1

42 U.S.C. § 9613(b) 3, 6, 9, 11

Other Authorities

Stern, Robert L., Gressman, Eugene,
Shapiro, Stephen M. & Geller, Kenneth S.,
Supreme Court Practice (8th ed. 2002) 9

INTRODUCTION

This is a case about the power of federal courts to enforce federal law. Almost two decades ago, the U.S. District Court for the Middle District of Louisiana entered judgment on a consent decree that established a detailed plan under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, to remediate chemical contamination at and around an industrial waste disposal site, and to prevent further contamination of nearby lands. Petitioners are companies bound by that judgment, as well as the company they established to carry out the remediation and three of its individual officers. They have now been sued by respondents, nearby landowners, who assert that the remediation measures taken by petitioners under the *federal* consent decree are inadequate to satisfy *state* law. Under basic principles of federalism, however, respondents cannot use an ostensible state lawsuit to mount a collateral attack on a federal judgment. Petitioners thus removed this lawsuit to federal court on two separate and independent grounds: (1) protective jurisdiction under the All Writs Act, 28 U.S.C. § 1651, to protect the integrity of the federal consent decree, and (2) federal-question jurisdiction under 28 U.S.C. § 1331, because respondents' ostensible state-law claims in fact arise under CERCLA. The Fifth Circuit erred, and deepened circuit conflicts on both grounds, by rejecting such removal.

The first of these grounds is presently pending before this Court in *Syngenta Crop Protection, Inc. v. Henson*, No. 01-757, *cert. granted*, 122 S. Ct. 1062 (Feb. 19, 2002) (scheduled for oral argument Oct. 15, 2002). In that case, the Eleventh Circuit rejected the use of the All Writs Act as a basis for removal of a state-law claim that allegedly conflicted with a prior federal judgment. 261 F.3d 1065, 1070-71. This Court's ruling in *Syngenta* will clarify when, if ever, the All Writs Act can serve as a basis for federal removal jurisdiction in cases (like this one) where a state lawsuit is alleged to conflict with a prior federal judgment. Accordingly, at the very least, this petition should be held pending the disposition of *Syngenta*.

The second of the jurisdictional grounds rejected below—the existence of federal-question jurisdiction under CERCLA—presents a separate and independent basis for this Court's review. Respondents' attempt to evade federal jurisdiction by artfully pleading only state-law claims is manifestly defective: respondents are necessarily and inescapably challenging the adequacy of petitioners' cleanup efforts under CERCLA. Respondents cannot avoid CERCLA's broad preemptive sweep in this area by simply slapping a state-law caption on their claims, and the contrary holding below conflicts with a line of Ninth Circuit cases recognizing that CERCLA jurisdiction is "more expansive than . . . those claims created by CERCLA," and "cover[s] any 'challenge' to a CERCLA cleanup." *Fort Ord Toxics Project, Inc. v. California EPA*, 189 F.3d 828, 832 (9th Cir. 1999) (internal quotation omitted).

At bottom, the Fifth Circuit took far too narrow and mechanical a view of federal jurisdiction, and thereby gave respondents *carte blanche* to flout federal law. To correct the Fifth Circuit's error, and to resolve the resulting circuit conflicts, this Court should grant *certiorari* in this case, or at the very least hold this petition pending the forthcoming disposition of *Syngenta*.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 295 F.3d 485 and reprinted in the Appendix ("App.") at 1a-12a. The district court's unpublished order denying respondents' motion to remand is reprinted at App. 13a, its unpublished ruling granting petitioners' motion for summary judgment is reprinted at App. 14a, and its unpublished opinion setting forth the reasons for that ruling is reprinted at App. 15a-21a.

JURISDICTION

The Fifth Circuit entered judgment on June 20, 2002. App. 2a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The All Writs Act, in relevant part, provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a).

The federal-question statute provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331.

The federal removal statute, in relevant part, provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

28 U.S.C. § 1441(b).

CERCLA, in relevant part, provides:

> Except as provided in [subsections not relevant here], the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy.

42 U.S.C. § 9613(b).

STATEMENT OF THE CASE

This case involves an industrial waste facility near Baton Rouge, Louisiana. During the 1960s and 70s, petitioners Exxon Mobil Corporation, United States Steel Corporation, DSM Copolymer, Inc., Crompton Manufacturing Company,

Inc., The Dow Chemical Company, Ethyl Corporation, Shell Chemical LP, Celanese Americas Corporation, and Honeywell International Inc., and/or their corporate predecessors, allegedly sent industrial waste to the site for disposal. App. 3a. In 1980, the U.S. Department of Justice, on behalf of the U.S. Environmental Protection Agency, sued those petitioners under CERCLA for environmental remediation of contamination at the site and nearby lands. App. 3a. That litigation was settled in Feburary 1984 by entry of a consent decree under which those petitioners agreed to investigate and remediate such contamination, and to prevent future contamination. App. 3a.

The 1984 consent decree, incorporated in a judgment of the U.S. District Court for the Middle District of Louisiana (Polozola, J.) established a comprehensive plan for the remediation and continued monitoring of the site and nearby lands. The decree expressly stated that "[t]he objectives of the parties, through entry of this Decree, are to protect public health and the environment from releases of hazardous wastes, solid wastes, hazardous substances and pollutants and contaminants [from the site] by the investigation, development, design and implementation of remedial and long-term monitoring programs for [the site] by the Industry Defendants." Decree ¶ 5, App. 24a. Thus, although respondents were not parties to the decree, a key objective of the decree was to protect them and other nearby landowners from contamination released from the site. To that end, the decree "provide[d] the framework for remedial actions to be employed, and an operation, maintenance and monitoring program to be established by Industry Defendants, subject to such future remedial actions, if any, as may be required to implement the terms of this Decree." Decree ¶ 6, App. 24a-25a. A new entity, petitioner NPC Services, Inc., was established for the sole purpose of carrying out remediation under the consent decree. App. 3a, 4a. The decree provided for the district court to retain jurisdiction over the dispute for thirty years after the completion of remediation. Decree ¶¶ 15-16, 30, 35, App. 25a-27a; App. 4a.

In July 1994, respondents filed two identical lawsuits in Louisiana state court against petitioners (including not only the companies covered by the 1984 consent decree, but also NPC Services, Inc., and three individuals who were then officers of that company), alleging that respondents' nearby lands had been contaminated by waste released from the site. App. 2a-3a, 28a-34a. The complaints purported to bring only negligence and strict liability torts under state law, and not a private cause of action under CERCLA. App. 31a. Among other things, however, the complaints charged that petitioners had violated local, state, and federal laws by allegedly failing (a) to prevent the release of toxic waste onto respondents' lands, (b) to provide proper storage facilities, (c) to install satisfactory safeguards to protect adjacent property, (d) to prevent improper release of emissions, (e) to develop a proper waste analysis program, (f) to properly train personnel, (g) to implement and follow an adequate groundwater plan, (h) to have a sufficient monitoring well system, (i) to use a state-of-the-art liner, (j) to test the site to determine its suitability, (k) to run solidification studies on wastes to ascertain whether such wastes had stabilized, (l) to warn the public of the dangers, (m) to protect respondents from ultrahazardous activity, (n) to refrain from tortious conduct, and (o) to act with the required duty of care. Compl. ¶ 19, App. 30a-31a. In addition, respondents specifically challenged actions undertaken by petitioner NPC Services, the corporation formed pursuant to the consent decree to remediate the site, and three of its individual officers. Compl. ¶¶ 27-29, App. 32a.

Petitioners removed the actions to the Middle District of Louisiana on the basis of, *inter alia*, the All Writs Act and federal-question jurisdiction. Respondents moved to remand, but the district court (Polozola, J.) denied the motion on the ground that the All Writs Act conferred jurisdiction or, alternatively, that respondents' claims really arose under CERCLA. App. 4a, 13a. Petitioners thereafter moved for summary judgment, on the ground that respondents could not establish that their lands had been contaminated by chemicals

released from the site, and the district court granted the motion. App. 14a-21a.

Respondents appealed, and the Fifth Circuit reversed on jurisdictional grounds. App. 1a-12a. The court rejected petitioners' reliance on the All Writs Act, holding that "[o]ur prior jurisprudence forecloses the possibility of removal under the All Writs Act except under 'extraordinary circumstances.'" App. 10a (quoting *Texas v. Real Parties in Interest*, 259 F.3d 387, 395 (5th Cir. 2001)). The court held that such circumstances were not present here, notwithstanding the fact that respondents' ostensible state-law claims necessarily challenged the adequacy of the 1984 consent decree, on the ground that "any threat to the consent decree is . . . speculative" and "[i]t is premature to conclude that [respondents'] demands . . . will affect the integrity of the consent decree." App. 12a. The court noted that this Court had granted *certiorari* in *Syngenta* to determine when, if ever, the All Writs Act can "serve as the sole basis for removal jurisdiction," but declined to await this Court's decision "[b]ecause the instant case does not require us to go beyond our holding in *Real Parties*." App. 11a n.6.

The Fifth Circuit also rejected petitioners' invocation of federal-question jurisdiction. The court acknowledged that "CERCLA contains a particularized jurisdictional statement, which provides that, except as otherwise provided, 'the United States district courts shall have *exclusive* original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy.'" App. 5a (quoting 42 U.S.C. § 9613(b)) (emphasis added). Nonetheless, the court held that respondents' claims, even though they necessarily challenged the adequacy of a CERCLA cleanup, did not "arise under" CERCLA because that statute contains various saving clauses and thus "does not *completely* preempt [respondents'] claims under Louisiana state law." App. 7a (emphasis added). The court also held that respondents' ostensible state-law claims did not "'depend[]

upon the construction or application' of federal law," App. 8a (quoting *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921)), even though those claims required respondents to show that CERCLA and the consent decree did not limit their property rights, because the scope of those rights "is *initially* a state law question," App. 9a (emphasis modified).

After rejecting both of petitioners' grounds for removal, the Fifth Circuit reversed the denial of respondents' remand motion, and vacated the district court's grant of summary judgment on the merits. App. 12a. This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Erred By Holding That Removal Is Unwarranted Here Under The All Writs Act.

The first issue presented in this petition—whether, and under what circumstances, the All Writs Act authorizes removal of state-law claims that threaten the integrity of an existing federal judgment—is the very issue presented in the pending *Syngenta* case scheduled for oral argument on October 15, 2002. Accordingly, at the very least, the Court should hold this petition pending the resolution of *Syngenta*, and then dispose of this case accordingly.

The Fifth Circuit "recognize[d] that the Supreme Court has granted certiorari on the question whether the All Writs Act can ever serve as the sole basis for removal jurisdiction." App. 11a n.6 (citing *Syngenta*, 122 S. Ct. 1062). Nonetheless, the court proceeded to decide this case, rather than await this Court's ruling in *Syngenta*, "[b]ecause the instant case does not require us to go beyond our holding in *Real Parties*." App. 11a n.6. Even assuming the Fifth Circuit was correct that this case is governed by its previous holding in *Real Parties*, that assertion provides no basis for *this* Court not to hold this case pending resolution of *Syngenta*, which will determine whether the jurisdictional standard applied in *Real Parties* (and this case) is correct.

The issue whether, and under what circumstances, the All Writs Act authorizes removal of state-court lawsuits alleged to conflict with a prior federal judgment has divided the courts of appeals in recent years, which is presumably why this Court granted certiorari in *Syngenta* in the first place. Several circuits have recognized that the All Writs Act authorizes removal jurisdiction where a state-court lawsuit threatens the integrity of a prior federal judgment—in particular, where (as here) such a lawsuit conflicts with a previous consent decree. *See, e.g., Xiong v. Minnesota*, 195 F.3d 424, 427 (8th Cir. 1999); *Bylinski v. City of Allen Park*, 169 F.3d 1001, 1002-03 (6th Cir. 1999); *NAACP v. Metropolitan Council*, 144 F.3d 1168, 1170-71 (8th Cir. 1998); *Sable v. General Motors Corp.*, 90 F.3d 171, 175 (6th Cir. 1996); *United States v. City of New York*, 972 F.2d 464, 469 (2d Cir. 1992); *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 864 (2d Cir. 1988). Other circuits apply a bright-line rule that the All Writs Act can *never* provide the basis for removal. *See, e.g., Henson v. Ciba-Geigy Corp.*, 261 F.3d 1065, 1070-71 (11th Cir. 2001), *cert. granted sub. nom Syngenta Crop Protection v. Henson*, 122 S. Ct. 1062 (2002); *Hillman v. Webley*, 115 F.3d 1461, 1469 (10th Cir. 1997). Yet other circuits (like the Fifth) have suggested an intermediate position that the All Writs Act may authorize removal in "extraordinary circumstances" where a state-court lawsuit "indisputably *demand*[s] [removal] as absolutely necessary to vouchsafe the central integrity of [a] federal court judgment," but not where (as here) a state-court lawsuit is alleged to conflict with a prior federal consent decree. *Real Parties*, 259 F.3d at 395 (emphasis in original).

Because petitioners could establish jurisdiction here under the standard applied by the Second, Sixth, and Eighth Circuits, rather than the more restrictive standard applied below, this case should at the very least be held pending disposition of *Syngenta*. Indeed, the Second, Sixth, and Eighth Circuit cases cited above are virtually indistinguishable from this case: in each of those cases, the courts upheld removal under the All Writs Act where an ostensible state-law action would (or at

least potentially could) conflict with a prior consent decree. *See, e.g., Sable*, 90 F.3d at 175 (upholding removal jurisdiction under the All Writs Act "to protect the EPA-negotiated consent agreements," and noting that "the Second Circuit [has] held that district courts have residual jurisdictional authority under the All Writs Act to protect federal consent judgments by removing potentially inconsistent state law claims to federal court") (citing *Yonkers*, 858 F.2d at 863-65)). Accordingly, a hold for *Syngenta* is warranted. *See, e.g.*, Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* §§ 4.16, 5.9 (8th ed. 2002).

II. The Fifth Circuit Erred By Holding That Removal Is Unwarranted Here Under Federal-Question Jurisdiction.

Over and above the *Syngenta* issue raised by the first question presented, this petition presents a separate and independent question warranting this Court's review: whether respondents' ostensible state-law claims actually "arise under" federal law within the meaning of the federal-question statute, 28 U.S.C. § 1331. It is well-established that plaintiffs cannot evade federal jurisdiction by simply slapping a state-law label on a claim that necessarily arises under federal law. *See, e.g., Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-67 (1987). That is precisely the case here: respondents' claims "arise under" CERCLA because they necessarily challenge the adequacy of petitioners' CERCLA cleanup. Accordingly, respondents' claims not only "arise under" federal law within the meaning of the federal-question statute, but fall within the "*exclusive* original jurisdiction" of the federal courts under CERCLA, 42 U.S.C. § 9613(b) (emphasis added).

Petitioners argued below, as the Fifth Circuit noted, that "the plaintiffs' complaint, though purporting to seek relief under Louisiana law, actually seeks relief under CERCLA." App. 6a. The Fifth Circuit rejected that argument, holding that respondents' claims "arose under" state law under the "well-

pleaded complaint" rule, because respondents purported to bring only state-law claims and CERCLA "does not *completely* preempt" state law. App. 7a (emphasis added). The Fifth Circuit thereby took an unduly narrow and rigid view of what claims "arise under" CERCLA. The fact that CERCLA does not completely preempt *all* state-law claims does not mean that CERCLA does not completely preempt *some* state-law claims.

In particular, the Fifth Circuit failed to appreciate that CERCLA completely preempts challenges to *the adequacy of a CERCLA cleanup*, so that plaintiffs cannot artfully "plead around" the statute by framing a challenge to a CERCLA cleanup as a state-law claim. Under CERCLA's exclusive jurisdiction provision, as the Ninth Circuit has emphasized, "'*only* federal courts shall have jurisdiction to adjudicate a 'challenge' to a CERCLA cleanup in the first place." *Fort Ord*, 189 F.3d at 832 (emphasis added). There, as here, plaintiffs filed ostensibly state-law claims that challenged a CERCLA cleanup. *See id.*; *see also Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 239 (9th Cir. 1995) (an action constitutes a challenge to a CERCLA cleanup "if it is related to the goals of the cleanup"). There, as here, plaintiffs argued that their claims nonetheless did not "arise under" CERCLA because they were not created by CERCLA. *Fort Ord*, 189 F.3d at 832. The Ninth Circuit, however, rejected that "cramped" interpretation of the statute: "[B]y granting district courts exclusive jurisdiction over 'all controversies arising under' CERCLA, Congress used language more expansive than would be necessary if it intended to limit exclusive jurisdiction solely to 'those claims created by CERCLA.'" *Id.* (quoting *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 715 (D. Kan. 1991)). Regardless of how a claim is officially styled, if it challenges the adequacy of a CERCLA cleanup, then it necessarily "arises under" CERCLA for purposes of federal jurisdiction. *See id.*; *see also Arco Envtl. Remediation, L.L.C. v. Department of Health & Envtl. Quality of Montana*, 213 F.3d 1108, 1115 (9th Cir. 2000) (noting that ostensible state-law actions "arise under" CERCLA if they are "related to the

goals" of a CERCLA cleanup, including actions that seek to "alter cleanup requirements or environmental standards"). Thus, notwithstanding the saving clauses on which the Fifth Circuit relied below, *see* App. 6a-7a, CERCLA preemption *is* "complete" with respect to claims (like those at issue here) challenging the adequacy of a CERCLA cleanup. "We believe congressional intent is best effectuated by reading § 113(b)'s exclusive jurisdiction provision to cover *any* 'challenge' to a CERCLA cleanup." *Fort Ord*, 189 F.3d at 832 (emphasis added).

Federal-question jurisdiction under CERCLA, thus, provides an adequate and independent ground for removing this case to federal court wholly apart from the All Writs Act. Because the Fifth Circuit erroneously rejected that ground for federal jurisdiction, and thereby brought itself into conflict with the Ninth Circuit, the second question presented here merits this Court's review wholly apart from the Court's resolution of the first question in *Syngenta*.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari or, in the alternative, hold this case pending disposition of *Syngenta*.

Respectfully submitted,

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APPENDIX

APPENDIX
TABLE OF CONTENTS

Page

Opinion of the Court of Appeals,
June 20, 2002 ..... 1a

Order of the District Court Denying Plaintiffs' Motion to Remand,
November 21, 1994 ..... 13a

Ruling of the District Court On Defendants' Motion for Summary Judgment,
January 21, 1998 ..... 14a

Opinion of the District Court Regarding Defendants' Motion for Summary Judgment,
December 4, 2000 ..... 15a

Judgment of the District Court,
December 4, 2000 ..... 22a

Consent Decree (excerpts)
February 16, 1984 ..... 23a

Respondents' Petitions (excerpts),
July 5, 1994 ..... 28a

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30122

MSOF CORPORATION; JAY PAUL LEBLANC,

Plaintiffs-Appellants,

versus

EXXON CORPORATION; ET AL.,

Defendants,

EXXON CORPORATION;
EXXON CHEMICAL CORPORATION;
USS CHEMICAL CO.;
COPOLYMER RUBBER & CHEMICAL CORPORATION;
UNIROYAL CORPORATION;
DOW CHEMICAL COMPANY;
ETHYL CORPORATION;
SHELL CHEMICAL CO.;
AMERICAN HOECHST CORPORATION;
ALLIED CHEMICAL CORPORATION;
RUBICON CHEMICAL CO.;
PETRO PROCESSORS OF LOUISIANA INC.;
ROBERT BOLGER;
J.W. STREET;
W.L. RAINEY;
NPC SERVICES INC.;
XYZ INSURANCE COMPANY,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana

June 20, 2002

Before GARWOOD, DAVIS and MAGILL,[1] Circuit Judges.

GARWOOD, Circuit Judge:

In this removed case, plaintiffs-appellants MSOF Corporation (MSOF) and Jay Paul LeBlanc (collectively, the plaintiffs) appeal the district court's judgment in favor of defendants-appellees Exxon Corporation, Exxon Chemical Corporation, USS Chemical Company, Copolymer Rubber & Chemical Corporation, Uniroyal Corporation, Dow Chemical Company, Ethyl Corporation, Shell Chemical Company, American Hoechst Corporation, Allied Chemical Corporation, Rubicon Chemical Company, Petro Processors of Louisiana, Inc. (PPI), Robert Bolger (Bolger), J.W. Street (Street), W.L. Rainey (Rainey), NPC Services, Inc. (NPC), and XYZ Insurance Company (collectively, the defendants). Appellants contend, *inter alia,* that the district court erred in denying their motion to remand. We agree with appellants, and accordingly vacate the district court's judgment and remand the case to the district court with instructions to return the case to the state court from which it was removed.

Facts and Proceedings Below

The plaintiffs own land in the Devil's Swamp area in the Parish of East Baton Rouge, Louisiana. On July 5, 1994, the plaintiffs filed suit against the defendants in Louisiana state court on behalf of themselves and all other similarly situated landowners, alleging that the defendants were responsible for contaminating their land with toxic chemicals. The defendants removed the case to the United States District Court for the Middle District of Louisiana. The plaintiffs filed a motion to remand, asserting that the district court did not have subject matter jurisdiction. After a hearing on the motion to remand,

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[1] Circuit Judge of the Eighth Circuit, sitting by designation.

the motion was denied. The defendants moved for summary judgment. The district court granted their motion, holding that the plaintiffs had not produced sufficient evidence to create a disputed issue of material fact relating to an essential element of their claim, and rendered judgment for defendants.

PPI, a Louisiana corporation, was the owner and operator of two hazardous waste disposal facilities in the Devil's Swamp region, the Brooklawn Site and the Scenic Highway site. With the exception of NPC, the other corporate defendants were industrial generators of hazardous waste that made use of the PPI disposal facilities. NPC, a Louisiana corporation, was formed by the industrial generator defendants in 1984 to clean up or remediate the PPI sites in accordance with a federal consent decree. Bolger was president of NPC. Street and Rainey were executive officers of NPC.

PPI operated its waste disposal facility, just north of Devil's Swamp, during the 1960's and 1970's. Plaintiffs' property is located approximately three miles south of the PPI facility. In 1980, the United States Department of Justice, on behalf of the Environmental Protection Agency, sued PPI and several of the industrial generators in the United States District Court for the Middle District of Louisiana under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.* The State of Louisiana, the City of Baton Rouge, and the Parish of East Baton Rouge intervened in that suit. On February 16, 1984, a consent decree was entered in that case by the United States District Court for the Middle District of Louisiana under which certain companies, including the industrial generator defendants in the present action, agreed to investigate and clean up contamination from the former PPI facility. The consent decree ordered, *inter alia,* that these sites be monitored for thirty years after the completion of remediation under the continuing supervision and jurisdiction of the district court. On August 28, 1989, the district court ordered that the consent decree be supplemented with a Supplemental Remedial Action

Plan prepared by the defendants. In 1984, the industrial generator defendants contracted with NPC to perform the remediation work, which has been underway since 1984 under the supervision of Judge Polozola. None of the plaintiffs in this case was ever a party to the consent decree or the case in which it was entered.

The plaintiffs' state court complaint alleged that toxic chemicals emanating from the PPI facility had contaminated their land in the southern half of Devil's Swamp. In resisting the plaintiffs' motion to remand to state court, the defendants asserted that the district court had original jurisdiction under the All Writs Act, 28 U.S.C. § 1651, federal question jurisdiction pursuant to 28 U.S.C. § 1331, and diversity jurisdiction pursuant to 28 U.S.C. § 1332.[2] The district court found that there was federal question jurisdiction because the plaintiffs' claims really arose under CERCLA, or, alternatively, that the All Writs Act conferred jurisdiction, because of the potential for interference with the court's earlier consent decree.

In granting the defendants' motion for summary judgment, the district court found that the plaintiffs had not produced sufficient evidence to support a finding that any toxic substances from the PPI site reached plaintiffs' land approximately three miles to the south. Because we hold that the district court lacked jurisdiction, it is not necessary to discuss that court's summary judgment rulings in further detail.

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[2] On appeal, the defendants have abandoned their argument for diversity jurisdiction. Plaintiffs are Louisiana citizens as are some of the defendants. To establish diversity jurisdiction the defendants would have the burden of showing that all the non-diverse defendants were fraudulently joined. *Wilson v. Republic Iron & Steel Co.*, 42 S. Ct. 35, 37 (1921). Since the defendants have not even attempted to carry this burden, diversity jurisdiction was not established and we do not further consider it.

Discussion

This court reviews a question of the district court's jurisdiction *de novo*. *United States v. Jimenez-Martinez*, 179 F.3d 980, 981 (5th Cir. 1999).

The district court found that there were at least two bases for exercising jurisdiction: federal question jurisdiction pursuant to CERCLA and jurisdiction by means of the All Writs Act. We hold that there is no basis for federal removal jurisdiction in this case.

I. Federal Question Jurisdiction

Title 28 states the general principles governing removal jurisdiction in non-diversity cases: "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties." 28 U.S.C. § 1441(b). "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. CERCLA contains a particularized jurisdictional statement, which provides that, except as otherwise provided, "the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy." 42 U.S.C. § 9613(b).

A federal court only has original or removal jurisdiction if the federal question appears on the face of the plaintiff's well-pleaded complaint and there is generally no federal jurisdiction if the plaintiff properly pleads only a state law cause of action. *E.g., Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 103 S. Ct. 2841, 2846-47 (1983). A case may "arise under" federal law "where the vindication of a right under state law necessarily turn[s] on some construction of federal law." *Id.* at 2846. But "this statement must be read with caution." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 106 S. Ct. 3229, 3232 (1986). A defense that raises a federal question is

insufficient. *Id.* Even if a plaintiff has a federal cause of action, he "may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar, Inc. v. Williams,* 107 S. Ct. 2425, 2429 (1987). The "artful pleading" doctrine is an "independent corollary" to the well-pleaded complaint rule. *Rivet v. Regions Bank,* 118 S. Ct. 921, 925 (1998). Under this principle, removal is not defeated by a plaintiff's omission to plead necessary federal questions. *Id.* "The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim." *Id.*

The plaintiffs' complaint alleges negligent and strict liability torts under Louisiana law. Its only reference to federal law is an allegation that the PPI facility was maintained in violation of federal regulations *as well as* in violation of state and local regulations. That, however, does not suffice to render the action one arising under federal law. *Willy v. Coastal Corp.,* 855 F.2d 1160, 1169-71 (5th Cir. 1988). The defendants argue that the plaintiffs' complaint, though purporting to seek relief under Louisiana law, actually seeks relief under CERCLA. The defendants note that the plaintiffs' petition demanded compensatory damages in an amount commensurate with the cost of restoring and remediating the plaintiffs' property and that CERCLA creates a cause of action for such costs. *See* 42 U.S.C. § 9607(a). However, Louisiana law also provides a cause of action under which these plaintiffs can attempt to prove that these defendants tortiously caused damage to the plaintiffs' land and can demand the very relief they seek. *See Mouton v. State,* 525 So.2d 1136, 1143 (La. App. 1st Cir. 1988); La. Civ. Code arts. 2315(A), 2317, 667. In enacting CERCLA, Congress expressly disclaimed an intent to preempt state tort liability for the release of hazardous substances. CERCLA contains a general saving clause and several section-specific saving clauses. The general saving clause, 42 U.S.C. § 9652(d), provides:

> "Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under

> other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of this chapter shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities."

42 U.S.C. § 9607(j), in the section of the Act that creates liability for response costs, provides, in pertinent part:

> "Recovery by any person . . . for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance."

This court and other courts have construed the CERCLA saving clauses in accordance with their plain meanings and have held that they preserve parties' rights arising under state law. *See, e.g., Aviall Servs. v. Cooper Indus.*, 263 F.3d 134, 140 (5th Cir. 2001) (42 U.S.C. § 9613(f) preserves the right of toxic tort defendants to seek contribution under state law); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 617 (7th Cir. 1998) (purpose of 42 U.S.C. § 9652(d) "is to preserve to victims of toxic wastes the other remedies they may have under federal or state law"); *see also Cropwell Leasing Co. v. NMS, Inc.*, 5 F.3d 899, 901 (5th Cir. 1993) (*per curiam*) (42 U.S.C. § 9652(d) preserves right of action under general maritime law). CERCLA does not completely preempt the plaintiffs' claims under Louisiana state law. Therefore, the "artful pleading" doctrine is inapplicable, *see Rivet*, 118 S. Ct. at 925,

and the plaintiffs are entitled to rely exclusively on state law causes of action, *Caterpillar,* 107 S. Ct. at 2429. There is no federal question jurisdiction arising from preemption or application of the artful pleading doctrine.

The defendants argue, however, that, even if the plaintiffs' complaint does not *de facto* state a CERCLA claim, plaintiffs' "right to relief depends upon the construction or application of" federal law. *Smith v. Kansas City Title & Trust Co.*, 41 S. Ct. 243, 245 (1921); *see also Franchise Tax Board,* 103 S. Ct. at 2846. The defendants assert that CERCLA and the consent decree create a "legal servitude" that imposes a limitation upon the ownership and use of the plaintiffs' property.[3] Therefore, the defendants argue, the plaintiffs' right to relief depends on construction of this servitude, which arises under federal law.

The Supreme Court, in *Merrell Dow Pharmaceuticals, Inc. v. Thompson,* 106 S. Ct. 3229 (1986), explained that the doctrine described in *Smith* and *Franchise Tax Board* must be treated with caution. *Id.* at 3232. "[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Id.* at 3234. The vindication of these plaintiffs' rights does not turn on resolution of a federal question. The question whether CERCLA or the consent decree could even constitute a

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[3] The plaintiffs' state law nuisance claims are grounded in La. Civ. Code Art. 667, which provides:
"Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."
La. Civ. Code Art. 669 provides:
"If the works or material for any manufactory or other operation, cause an inconvenience to those in the same or in the neighboring houses, by diffusing smoke or nauseous smell, and there be no servitude established by which they are regulated, their sufferance must be determined by the rules of the police, or the customs of the place."
La. Civ. Code Art. 659 explains: "Legal servitudes are limitations on ownership established by law for the benefit of the general public or for the benefit of particular persons."

"servitude" under Louisiana law is initially a *state* law question. The defendants do not cite any Louisiana cases purporting to answer this question and our research discloses no such case.[4]

We hold that neither CERCLA nor the mere existence of the federal consent decree creates federal "arising under" jurisdiction in this case. Therefore, we must consider whether the All Writs Act standing alone supports removal jurisdiction.

II. Removal Jurisdiction Under the All Writs Act

The All Writs Act, 28 U.S.C. § 1651(a), provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The Supreme Court has held that the All Writs Act may authorize a federal court to issue orders "as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States v. New York Telephone,* 98 S. Ct. 364, 372 (1977). The Act is not an independent grant of jurisdiction. *In re McBride,* 117 F.3d 208, 220 (5th Cir. 1997); *see also Clinton v. Goldsmith,* 119 S. Ct. 1538, 1542 (1999) (All Writs Act does not enlarge jurisdiction). However, some circuits have read the All Writs Act to permit "removal"[5] to the

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[4] The defendants also contend that the plaintiffs' negligence claims arise under federal law because the scope of what is authorized under CERCLA and the consent decree may limit the defendants' obligations to the plaintiffs. *Franchise Tax Board* easily disposes of this argument. *See Franchise Tax Board,* 103 S. Ct. at 2848 (there is no federal question jurisdiction when "federal law becomes relevant only by way of a defense to an obligation created entirely by state law, and then only if [the plaintiff] has made out a valid claim for relief under state law").

[5] "Removal" is here used in a general sense because, technically, removal is properly accomplished under 28 U.S.C. § 1441. *Texas v. Real Parties in*

federal court of at least some state court actions that were otherwise non-removable. *See, e.g., NAACP v. Metropolitan Council,* 144 F.3d 1168, 1170-71 (8th Cir. 1998); *Davis v. Glanton,* 107 F.3d 1044, 1047 n.4 (3d Cir. 1997); *Sable v. General Motors Corp.,* 90 F.3d 171, 175 (6th Cir. 1996); *In re VMS Securities Litigation,* 103 F.3d 1317, 1323 (7th Cir. 1996); *In re Agent Orange Prod. Liab. Litig.,* 996 F.2d 1425, 1431 (2d Cir. 1993). At least two circuits have held that the All Writs Act can never facilitate removal of an otherwise non-removable action. *Henson v. Ciba-Geigy Corp.,* 261 F.3d 1065, 1070 (11th Cir. 2001), *cert. granted sub nom. Syngenta Crop Protection v. Henson,* 122 S. Ct. 1062 (2002); *Hillman v. Webley,* 115 F.3d 1461, 1469 (10th Cir. 1997); *see also Nichols v. Harbor Venture, Inc.,* 284 F.3d 857, 863 (8th Cir. 2002).

Our prior jurisprudence forecloses the possibility of removal under the All Writs Act except under "extraordinary circumstances." *Texas v. Real Parties in Interest,* 259 F.3d 387, 395 (5th Cir. 2001) ("In the absence of such extraordinary circumstances . . . that indisputably *demand* such a course of action as absolutely necessary to vouchsafe the central integrity of the federal court judgment, we hold that the All Writs Act cannot be employed as a vehicle for removal."), *cert. denied sub nom Umphrey v. Texas,* 122 S. Ct. 924 (2002). In *Real Parties,* we declined to decide whether extraordinary circumstances could ever permit removal under the All Writs Act because, even if such removal was permissible, the circumstances of that case were not sufficiently extraordinary to warrant it. *Id.* at 394-95. We expressed our doubt that All Writs Act removal was proper even in the face of extraordinary circumstances. *See id.* at 394 (describing this possibility as a "remote proposition"). We held above that federal "arising under" jurisdiction does not exist in the instant case. So we must now consider whether this case presents extraordinary circumstances that might possibly warrant All Writs Act

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Interest, 259 F.3d 387, 390 n. 7 (5th Cir. 2001).

removal. Only if this case presented such circumstances would we be required to answer the question that the *Real Parties* court left undecided.[6]

The circumstances of this case do not "indisputably *demand* " that removal is "absolutely necessary to vouchsafe the central integrity" of the consent decree. *Real Parties*, 259 F.3d at 395. On the face of their pleadings, the plaintiffs seek compensatory damages under state tort law for alleged injuries to their land. They do not either claim violations of the consent decree or allege that the actions complained of are in conformity with the consent decree; nor do they seek any changes to the consent decree, although, as noted above, the defendants might conceivably attempt to assert compliance with the consent decree as a defense to the plaintiffs' negligence claims. However, the consent decree certainly does not expressly purport to authorize any contamination of plaintiffs' land or anything else plaintiffs complain of. The stated objectives of the consent decree are "to protect public health and the environment from releases of hazardous wastes, solid wastes, hazardous substances and pollutants and contaminants" from the PPI facility. If anything, the plaintiffs' suit is consistent with these objectives, not at odds with them. Pursuant to the consent decree, the governmental entities who were plaintiffs in the underlying suit covenanted not to sue the defendants. But the plaintiffs in this case were not parties to that suit or to the consent decree. The consent decree specifically provides that "[i]t is not the purpose of this agreement nor the intention of the parties to release any other persons or entities not parties to this Consent Decree from any claims or liabilities, the right to pursue which is expressly reserved."

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[6] We recognize that the Supreme Court has granted certiorari on the question whether the All Writs Act can ever serve as the sole basis for removal jurisdiction. *See Syngenta*, 122 S. Ct. 1062. Because the instant case does not require us to go beyond our holding in *Real Parties*, we proceed to decide it rather than await *Syngenta*.

In *Real Parties,* the State of Texas had instituted a pre-suit discovery proceeding in state court to investigate claims of fraud and breach of fiduciary duty against private attorneys in the course of their representation of the state in the federal court tobacco litigation. The private attorneys removed the proceeding to federal district court, arguing that it threatened to interfere with a settlement agreement regarding attorneys' fees that had previously been approved by the district court. We found that it was entirely speculative that the investigative proceeding might somehow interfere with the settlement agreement and that the Texas courts were the proper forum for the proceeding, at least "unless and until" it posed an actual threat to the settlement agreement. *Real Parties,* 259 F.3d at 394-95. In the instant case, any threat to the consent decree is now similarly speculative. It is premature to conclude that the plaintiffs' demands for compensatory damages will affect the integrity of the consent decree. *Cf. Nichols,* 284 F.3d at 862 ("[A]llowing federal jurisdiction over [the plaintiff's] state-law claims under the auspices of the All Writs Act, when the federal consent decree will not be directly affected for good or ill by the outcome of the case, would result in a corruption of the Act.") Should an actual threat to the consent decree arise as the case proceeds in state court, circumstances may permit the federal district court to enjoin the state proceedings. *See Real Parties,* 259 F.3d at 395. But this case now presents no circumstances that could permit removal jurisdiction under the All Writs Act, if, indeed, such removal jurisdiction is ever permitted. *See id.*

Conclusion

Because we hold that the district court lacked jurisdiction, we REVERSE the denial of the plaintiffs' motion to remand, VACATE the judgment of the district court, and REMAND the case to the district court with directions that it be returned to the state court from which it was removed.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MSOF CORPORATION, ET AL.	CIVIL ACTION
VERSUS	NUMBER 94-990-B
EXXON CORPORATION	

consolidated with

MSOF CORPORATION, ET AL	CIVIL ACTION
VERSUS	NUMBER 94-991-B
EXXON CORPORATION	

ORDER

IT IS ORDERED that the plaintiffs' motions to remand be DENIED.

IT IS FURTHER ORDERED that the Clerk of Court open Civil Action Number 94-2671-B-M2; MSOF Corporation and Jay Paul Leblanc versus Rollins Environmental Services, Incorporated.

Baton Rouge, Louisiana, November 21, 1994.

/s/
FRANK J. POLOZOLA,
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CONSOLIDATED CASES:

MSOF CORPORATION, ET AL VERSUS EXXON CORPORATION, ET AL	CIVIL ACTION NUMBER 94-990-B-M2
MSOF CORPORATION, ET AL VERSUS EXXON CORPORATION, ET AL	CIVIL ACTION NUMBER 94-991-B-M2

RULING

For written reasons to be assigned at a later date, the Court issues the following rulings:

(1) The motion for summary judgment filed by Exxon Corporation, Uniroyal Corporation, Dow Chemical Company, Ethyl Corporation, Shell Chemical Co., Allied Chemical, Robert Bolger, J.W. Street, W.L. Rainey, NPC Services, Inc., DSM Copolymer, USX Corporation, and Hoeschst [*sic*] Celanese Corporation are [*sic*] hereby GRANTED. The Court will submit written reasons at a later date. The Court will withhold final judgment on the motion until further orders of this Court.

(2) The motion for summary judgment filed by Rollins Environmental Services is DENIED because material issues of fact remain in dispute.

IT IS SO ORDERED.

Baton Rouge, Louisiana, January 21, 1998.

/s/
FRANK J. POLOZOLA,
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MSOF CORPORATION, ET AL.	CIVIL ACTION
VERSUS	NUMBER 94-990-B
EXXON CORPORATION, ET AL.	

CONSOLIDATED WITH

MSOF CORPORATION, ET AL.	CIVIL ACTION
VERSUS	NUMBER 94-991-B
EXXON CORPORATION, ET AL.	

REASONS

MSOF Corporation (MSOF) and J. Burton LeBlanc[1] originally filed this suit individually and as a class action in the 18th JDC. The defendants timely removed the suit to federal court. Thereafter, the Court granted the defendants' motion for summary judgment. The Court now assigns reasons for the Court's decision.

I. Background

Plaintiffs filed this suit claiming their land had been damaged because of contamination which allegedly migrated from defendants' property. Named as defendants in this suit were Exxon Corporation, Exxon Chemical Corporation, U.S.S. Chemical Co., Copolymer Rubber & Chemical Corporation, Uniroyal Corporation, Dow Chemical Company, Ethyl Corporation, Shell Chemical Co., American Hoechst Corporation, Allied Chemical Corporation, Rubicon Chemical Co., Petro Processors of Louisiana, Inc., Robert Bolger, J.W.

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[1] The Court will sometimes refer to both plaintiffs as MSOF.

Street, W.L. Rainey, and NPC Services, Inc.[2] Defendants contend this Court had subject matter jurisdiction based on the All Writs Act, federal question, and diversity jurisdiction.[3]

Defendants filed their motion for summary judgment alleging that the record fails to show the existence of any contaminants from the defendants' Petro Processors site on MSOF property. In response to defendants' motion, plaintiffs rely on the expert opinion of Dr. David Link to show there is contamination or at least create a material issue of fact which would preclude the Court from granting defendants' motion for summary judgment.

Defendants argue that Dr. Link's opinion is not sufficient to provide a basis to sustain Plaintiffs' claims because it is a speculative, unreliable, and implausible expert opinion which is inadmissible under the standard delineated by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[4] *Kumho Tire Co. v. Carmichael*,[5] and a number of Fifth Circuit cases.[6]

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[2] These parties will sometimes be referred to collectively as the Petro Processors defendants. Rollins Environmental Services (LA), Inc. was also originally named as a defendant. Since the suit was filed, Rollins was purchased by Safety-Kleen, Inc., which has filed a bankruptcy proceeding. The proceedings against Safety-Kleen, Inc. have been stayed.

[3] Plaintiffs filed a motion to remand which was denied by this Court. The Court again finds it has subject matter jurisdiction herein. As the record reflects, there is a pending suit which was filed by the United States and the State of Louisiana to force the clean up of the Petro Processors site. USA v. Petro Processors LA, No. 80-CV-358. The Court has been monitoring this suit for years.

[4] 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

[5] 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

[6] *Bondy v. Texas Eastern Transmission Corp.*, 701 F. Supp. 112 (M.D. La. 1988), *aff'd*, 872 F.2d 422 (5th Cir. 1989); *Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis*, 799 F.2d 218 (5th Cir. 1986); *Viterbo v.*

II. Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[7]

The well-established criteria that there must be no *genuine* issue of *material* fact before summary judgment will issue insures that a properly supported motion will not be defeated simply by the "existence of *some* alleged factual dispute."[8] With respect to "materiality," because the underlying substantive law is referenced to determine what facts are material,[9] only factual disputes that might affect the action's outcome under governing law can properly preclude summary judgment; disputes over facts which have no effect on the action's resolution are irrelevant.[10] In addition, even if material, a factual dispute will not prevent summary judgment if the dispute is not "genuine." Such a conclusion is reached when the evidence could not lead a rational trier of fact to return a verdict for the non-moving party.[11] In examining the

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Dow Chemical Co., 826 F.2d 420 (5th Cir. 1987).

[7] FED. R. Civ. P. 56(c). See also *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Cormier v. Pennzoil Exploration & Prod. Co.*, 969 F.2d 1559, 1560 (5th Cir. 1992).

[8] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

[9] *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510.

[10] *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510.

[11] *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510. See also *Kelley v. Price-Macemon, Inc.*, 992 F.2d 1408, 1413 (5th Cir. 1993) ("If, on the other hand, the factfinder [sic] could reasonably find in [favor of the non-moving party], then summary judgment is improper.").

record, the Court will view the evidence and draw all reasonable inferences therefrom in favor of the non-moving party.[12]

As always, the moving party bears the initial burden of establishing that there is no genuine issue of material fact.[13] In this situation, where the moving party does not bear the burden of proof on the issue at trial, the movant may discharge its burden by simply informing the Court of the basis for its motion and either producing evidence that negates the existence of a material element in the non-moving party's claim or defense or identifying to the Court those portions of the record which demonstrate the lack of proof supporting a crucial element of the non-movant's case.[14]

Once the moving party makes the proper showing, the burden shifts to the non-moving party to designate "specific facts" in the record, by way of non-conclusory affidavits, depositions, answers to interrogatories or admissions on file, which evidence that there is a genuine issue for trial.[15] Because it bears the ultimate burden of proof at trial, the non-moving party is required to establish each element crucial to its action "since a complete failure of proof concerning an essential element of the non [-]moving party's case necessarily renders

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[12] *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513; *Newport Ltd. v. Sears, Roebuck & Co.*, 6 F.3d 1058, 1064 (5th Cir. 1993).

[13] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

[14] *Celotex*, 477 U.S. at 323-24, 106 S. Ct. at 2553; *Latimer v. Smithkline & French Labs.*, Div. of Smithkline Beckman Corp., 919 F.2d 301, 303 (5th Cir. 1990); *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir. 1990).

[15] *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553; *Kelley v. Price-Macemon, Inc.*, 992 F.2d at 1413.

all other facts immaterial.[16] The non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings and "must do more than simply show there is some metaphysical doubt as to the material facts."[17] When all the evidence presented by both parties "could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'" and summary judgment is proper.[18]

III. Law and Analysis

When expert testimony is offered to create a material fact issue, the court must assess under *Daubert* and *Kumho* whether the testimony is admissible, and if not, the testimony cannot be used to defeat summary judgment.[19] The Court finds that Dr. Link's opinion regarding the origin of the trichloroethene (TCE) and tetrachloroethene (PCE) on the MSOF property lacks the scientific reliability and validity required by *Daubert* in a number of respects.

Dr. Link is not qualified as a matter of fact and law to render an expert opinion as to the source of the chemicals at issue. It is clear that Dr. Link has no training in chemical fate and transport, and admits that his field of clastic sedimentology does not allow him to determine whether the chemicals at issue came from one particular source as opposed to another. Based on the applicable jurisprudence, the Court finds that Dr. Link is simply not qualified to render an expert opinion on this issue.

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[16] *Celotex*, 477 U.S. at 322-23, 106 S. Ct. at 2552.

[17] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

[18] *Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356.

[19] *Hopkins v. NCR Corp.*, 1994 WL 757510 at *6 (M.D. La. 1994), *aff'd*, 53 F.3d 1281 (5th Cir. 1995) (citing *Claar v. Burlington Northern Railroad Co.*, 29 F.3d 499 (9th Cir. 1994)).

Dr. Link's opinion also lacks objectivity. He opines as to the source of the chemicals at issue, yet his work did not include origin assessment nor did it follow standard procedure for origin assessment. The formation of an opinion prior to the conduction of research indicates a lack of reliability.[20] Furthermore, the methodology used by Dr. Link lacks reliability. The assumptions regarding chemical fate and transport are speculative at best, erroneous at worst. Additionally, the sampling protocol and analytical data used to demonstrate the presence of TCE and PCE on MSOF property were not scientifically valid.

In summary, the Court finds that Dr. Link's opinion cannot be accepted by the Court to determine the origin of TCE and PCE allegedly found on the MSOF property. Dr. Link's opinion is based on unscientific and speculative theories. In addition, the opinion is scientifically unreliable under the Federal Rules of Evidence, *Daubert* and *Kumho* because it was not reached by following scientific methods and reasoning. Therefore, it cannot be applied to assist the Court in understanding or determining the fact at issue. Finally, the unreliability of Dr. Link's opinion is based on the following:

1. The absence of expertise in chemistry and fate and transport properties of the chemicals at issue;
2. The opinion is biased and shows a lack of objectivity;
3. The sampling was not intended to identify the source of purported contaminants on MSOF property;
4. There was a failure to evaluate other known sources of contamination in the area;
5. Dr. Link ignored and/or made wrong assumptions about relevant and necessary chemical fate and transport principles;

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[20] *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 423 n.2 (5th Cir. 1987).

6. Many of Dr. Link's conclusions contradict his own reasoning or were made without following acknowledged standard procedures;

7. There was failure to offer scientific proof of how TCE and PCE which allegedly came from Petro Processors attached to clay particles and eventually located on MSOF property in the concentrations found by Dr. Link and without a single detection of HCB or HCBD; and

8. Reliance on invalid analytical data to conclude that TCE and PCE are on MSOF Property.

Therefore, the Court finds that plaintiffs cannot use Dr. Link's opinion to establish that their property was contaminated by Defendants or to create a material issue of fact which would preclude the Court from granting a summary judgment.[21]

IV. Conclusion

The Court has considered all of the arguments and contentions of the parties whether specifically discussed herein or not. The Court finds that the defendants are entitled to summary judgment as a matter of fact and law under the facts of this case. Judgment shall be entered granting defendants' motion for summary judgment and dismissing plaintiffs' suits with prejudice at plaintiffs' costs.

Baton Rouge, Louisiana, December 4, 2000.

/s/

FRANK J. POLOZOLA, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

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[21] See *Bondy v. Texas Eastern Transmission Corp.*, 701 F. Supp. 112 (M.D. La. 1988), *aff'd*, 872 F. 2d 422 (5th Cir. 1989); *Berry v. The Armstrong Rubber Co.*, 989 F.2d 822 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1067 (1994).

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MSOF CORPORATION, ET AL.	CIVIL ACTION
VERSUS	NUMBER 94-990-B
EXXON CORPORATION, ET AL.	

CONSOLIDATED WITH

MSOF CORPORATION, ET AL.	CIVIL ACTION
VERSUS	NUMBER 94-991-B
EXXON CORPORATION, ET AL.	

JUDGMENT

For the written reasons assigned:

IT IS ORDERED AND ADJUDGED that judgment shall be entered in favor of the defendants and against the plaintiffs dismissing this suit with prejudice.

Baton Rouge, Louisiana, December 4, 2000.

/s/
FRANK J. POLOZOLA, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,
Plaintiff

VERSUS CIVIL ACTION NO. 80-358-B

PETRO PROCESSORS OF LOUISIANA, INC.; UNITED STATES STEEL CORP.; COPOLYMER RUBBER AND CHEMICAL CORP.; UNIROYAL, INC.; ETHYL CORP.; DOW CHEMICAL CO.; SHELL OIL COMPANY; AMERICAN HOECHST CORP.; EXXON CORP.; EXXON CHEMICAL CO.; ALLIED CHEMICAL CORP.; RUBICON CHEMICALS CORP.,
Defendants

AND

STATE OF LOUISIANA
CITY OF BATON ROUGE, AND
PARISH OF EAST BATON ROUGE,
Intervenors

* *

CONSENT DECREE

Plaintiffs, United States of America (United States), on behalf of the Administrator of the United States Environmental Protection Agency (EPA), Intervenor Plaintiffs, State of Louisiana (Louisiana) and the City of Baton Rouge (Baton Rouge), hereafter collectively referred to as "Plaintiffs," and certain of the Defendants, United States Steel Corporation, Copolymer Rubber and Chemical Corporation, Uniroyal, Inc., The Dow Chemical Co., Ethyl Corp., Shell Oil Company,

American Hoechst Corp., Exxon Corporation, Allied Corporation, and Rubicon Chemicals, Inc., (collectively "Industry Defendants") have each agreed to the making and entry of this Consent Decree ("Decree") prior to completion of trial and without any admission of liability or fault as to any allegation or matter arising out of the pleadings of any party.

Each undersigned representative of the parties to this Consent Decree certifies that he or she is fully authorized to enter into the terms and conditions of this Decree and to execute and legally bind such party to this document.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED:

* * *

5.

The objectives of the parties, through entry of this Decree, are to protect public health and the environment from releases of hazardous wastes, solid wastes, hazardous substances and pollutants and contaminants (hereinafter collectively "wastes") from the Brooklawn and Scenic Highway sites, by the investigation, development, design and implementation of remedial and long-term monitoring programs for both sites by the Industry Defendants. The remedial programs shall employ sound scientific, engineering and construction practices.

6.

Plaintiffs and the Industry Defendants have agreed to a "Conceptual Closure Plan" for remedial work and monitoring programs at both sites contingent upon the acquisition, at a reasonable price, of suitable land contiguous to said sites or connected to said sites by a private right of way or servitude owned by or accorded to Industry Defendants and to which the public does not have access.

The Conceptual Closure Plan is attached hereto and incorporated herein by reference as "Attachment A." That Plan and this Decree provide the framework for remedial actions to

be employed, and an operation, maintenance and monitoring program to be established by Industry Defendants, subject to such future remedial actions, if any, as may be required to implement the terms of this Decree.

If such land cannot be so acquired, by industry Defendants or for their use for the purposes stated herein, Industry Defendants shall promptly notify Plaintiffs and the Court in writing, and within one hundred twenty (120) days thereafter shall propose an Alternative Conceptual Closure Plan, the propriety of which, in the event of disapproval by plaintiffs, shall be determined in accordance with Paragraph 30 herein. Upon approval by plaintiffs or after hearing by the Court, said plan shall be implemented in accordance with this Decree.

* * *

I.

After completion of the remedial action contemplated under the Conceptual Closure Plan and the Remedial Design and Construction Plans, the defendants will be responsible for any further necessary remedial action consistent with this Decree, ongoing operation and maintenance of the sites in order to (a) prevent the release or threat of release of hazardous wastes and/or substances and (b) any resulting or threatened endangerment from the sites. Defendants will be responsible for monitoring the sites for thirty (30) years after the completion of the remedial action. If after the expiration of this period of time the United States or the States of Louisiana determines that continued monitoring is necessary to protect human health, welfare or the environment, either or both may extend the time for monitoring as is necessary to afford such protection. Written notice of this extension shall be sent to each Industry Defendant and the Court. If the Industry Defendants object to the extension they shall file written objections with the Court within thirty (30) days thereafter. The burden shall be on the Industry Defendants to prove that

the extension is not necessary to protect human health, welfare and the environment.

16.

If during the term of this Consent Decree, the monitoring program specified in the Conceptual Closure Plan detects the release or threat of release from the Sites of hazardous substances, pollutants or contaminants, the Industry Defendants shall submit a supplemental remedial action plan to the United States and Louisiana for their review and approval in order to prevent or mitigate such releases, if necessary to protect the public health, welfare or the environment. If the United States, the State of Louisiana and the Industry Defendants do not agree on the need for a remedial action plan or the scope and details of such a plan, the disagreement shall be submitted to the Court for resolution in accordance with the procedures set forth in Paragraph 30 herein. Upon approval of such a supplemental remedial action plan by Plaintiffs or after hearing by this Court, said plan shall be implemented in accordance with the procedures outlined in this Decree.

* * *

30.

Except as otherwise provided herein, any dispute which arises with respect to the meaning, application or interpretation of this Consent Decree or with respect to any of the parties' compliance herewith or performance hereunder (including, but not limited to, disputes concerning the adequacy of plans for implementing the Conceptual Closure Plan required to be submitted by Industry Defendants), which the parties cannot resolve through informal negotiations within twenty (20) days, will be automatically referred to the Court for appropriate resolution upon written notice by any party to the Court of the existence of such dispute and the failure to resolve the dispute within the delays fixed herein for negotiations. Said period of negotiations may be extended by mutual agreement among the parties, upon written notice to the Court, and may be waived by

either party. It shall be the responsibility of the Industry Defendants to file the documents necessary to notify the Court of the dispute, and thereafter the Court shall order the parties to file such pleadings as the Court deems necessary and proper. The Court shall resolve such disputes by the preponderance of the evidence standard.

* * *

35.

This Court shall retain jurisdiction over this matter for the purpose of enabling any party hereto to apply to this Court for such further orders or directions as may be necessary or appropriate to construe, implement, modify, enforce, terminate or reinstate the terms of this Consent Decree, or for any and further relief as the interest of justice may require.

* * *

Dated and entered this 16 day of February, 1984.

/s/ Frank J. Polozola
UNITED STATES DISTRICT JUDGE

APPENDIX G

18TH JUDICIAL DISTRICT COURT

PARISH OF IBERVILLE

STATE OF LOUISIANA

MSOF CORPORATION and JAY PAUL LEBLANC — NUMBER 44,710 DIV. D

VERSUS

EXXON CORPORATION,
EXXON CHEMICAL COMPANY,
U.S.S. CHEMICAL COMPANY,
COPOLYMER RUBBER AND
CHEMICAL CORPORATION
UNIROYAL CORPORATION,
DOWN CHEMICAL COMPANY,
ETHYL CORPORATION,
SHELL CHEMICAL CORPORATION,
AMERICAN HOECHST CO. (f/k/a
FOSTER GRANT COMPANY),
ALLIED CHEMICAL CORPORATION,
RUBICON CHEMICAL COMPANY,
PETRO PROCESSORS OF LOUISIANA,
INC., ROLLINS ENVIRONMENTAL
SERVICES (LA), INC., ROBERT BOLGER,
J.W. STREET, W.L. RAINEY, NPC
SERVICES, INC. and XYZ INSURANCE
COMPANY

PETITION

NOW INTO COURT through undersigned counsel, come Plaintiffs, **MSOF CORPORATION**, a Louisiana corporation, domiciled and doing business in the State of Louisiana, and **JAY PAUL LEBLANC**, a resident of legal age of the Parish

of East Baton Rouge, State of Louisiana, both individually and on behalf of all other similarly situated (hereinafter referred to as "Plaintiffs"), who, on information and belief, with respect represent:

1.

Plaintiffs comprise any and all landowners whose property has become contaminated as a result of the action and/or inactions of defendants, including those landowners who own property and/or possess an ownership interest in properties comprising what is known as *Devil's Swamp* located in the Parish of East Baton Rouge, State of Louisiana.

* * *

12.

On information and belief, from approximately 1965 to 1980, the "Generator Defendants" manufactured, generated, transported and placed hazardous/toxic wastes at Defendant's Petro Processors' facilities located adjacent to Plaintiffs' properties in East Baton Rouge Parish, State of Louisiana.

* * *

16.

It is alleged, upon information and belief, that from a period of time commencing during early 1965 until around 1980, the Defendants either owned, maintained, operated, transported to, produced, manufactured, or caused to be stored toxic and/or hazardous waste at the *Brooklawn* and *Scenic Sites* described above and otherwise known as the Petro Processor facilities located in the Parish of East Baton Rouge, State of Louisiana.

* * *

18.

On numerous occasions and on a continuing basis, "Generator Defendants" have allowed to escape from the Petro Processors hazardous waste sites various chemicals, which chemicals are escaping laterally from the pits and into the

properties comprising Devil's Swamp rendering Plaintiffs' property contaminated with numerous hazardous waste and materials, including the hazardous/toxic substances outlined in Paragraph 16 herein.

19.

Defendants have, on numerous occasions, on a continuing basis, maintained a substandard hazardous waste disposal facility in violation of both state, local and federal regulations, more particularly, but not exclusively as follows:

A. Operating a hazardous waste site disposal facility which releases hazardous and toxic waste thereby injuring and damaging Plaintiffs and their property located in Devil's Swamp further causing said property to be highly contaminated with hazardous substances, resulting in said properly becoming useless and nonmerchantable;

B. Failure to provide proper storage facilities to prevent seepage of these toxic chemicals into the ground water and adjacent property;

C. Failure to install satisfactory safeguards to protect the adjacent property;

D. Failure to properly prevent improper release of fugitive emission or emissions which should not or legally cannot be released;

E. Failure to develop a proper waste analysis program to properly deal with waste disposal;

F. Failure to conduct proper training of waste disposal site personnel and/or to have properly trained personnel on its site at all times;

G. Failure to file an adequate ground water sampling and analysis plans and failure to properly maintain an inspection log and follow an inspection schedule;

H. Failure to have a sufficient monitoring well system capable of detecting release or threatened releases from the sites;

I. Failure to construct a hazardous waste site which contained a liner which was consistent with the state of the art at the time of construction;

J. Failure to test the disposal site to determine the suitability for the purpose to which it was put;

K. The dumping of unstabilized liquid waste matter into cells at the Petro Processor, Inc. sites and failure to run solidification studies on waste to ascertain whether or not said waste had been stabilized;

L. Failure to warn the general public of the dangers known or thought to be associated with these wastes;

M. Being involved in ultra-hazardous activity and not adequately protecting Plaintiffs and their property considering said ultra-hazardous activity;

N. Other acts of negligence and/or fault and/or strict liability which may be shown through discovery or at a trial on the merits; and

O. Generally, the failure of Defendants to act with the required degree of care commensurate with the existing situation and considering the fact that Petro Processors, Inc. was involved in an ultra-hazardous waste site disposal activity.

* * *

23.

As a result of the Defendants' actions, Plaintiffs show that the Defendants are strictly liable *in solido*, pursuant to Louisiana law, including, but not limited to Civil Code Articles 2315, 2317, and 667, as well as pursuant to the doctrines of trespass and nuisance for the damages which Defendants have caused or caused to be caused to Plaintiffs' Devil's Swamp properties.

* * *

27.

Defendant, NPC Services, Inc., is engaged in the ultra-hazardous activity of remediating the *Brooklawn Site* and *Scenic Highway Site* and through their [*sic*] failure to properly and adequately delineate the depth and extent of the subsurface contamination at these sites, NPC Services, Inc. has caused and allowed the spread of the hazardous chemicals and wastes to the Plaintiffs' lands, thereby rendering NPC Services, Inc. strictly liable to Plaintiffs.

28.

Plaintiffs further show that NPC Services, Inc. negligently failed to design and implement proper engineering controls and containment technologies to prevent the spread of surface and subsurface contamination to the Plaintiffs' properties.

29.

On information and belief, Defendants, Robert Bolger, J.W. Street, and W.L. Rainey, in their capacity as Executive Officers of Defendant, NPC Services, Inc., negligently permitted the improper and inefficient remediation activities of NPC Services, Inc. to proceed, including, but not limited to the improper and incomplete delineation of the site contamination, and implementation of the improper and inadequate engineering controls and containment technologies which allowed contaminants to continuously escape from the *Brooklawn* and *Scenic Highway Sites* to the Plaintiffs' properties. As a result of the actions of the Defendants, Plaintiffs' properties have been rendered virtually worthless and uninhabitable.

* * *

31.

Plaintiffs contend that the Defendants are liable *in-solido* to remediate and restore Plaintiffs' properties to the original conditions of said property as it existed when purchased by Plaintiffs.

WHEREFORE, Plaintiffs pray on their behalf individually, and on behalf of all others similarly situated that the Defendants be cited to appear and answer this petition, and that after due proceedings had, that there be judgment entered herein as follows:

I. That an Order be entered herein and certifying this action and maintaining this action as a class action;

II. That the Plaintiffs and class members herein be awarded compensatory damages in an amount to be proven at trial commensurate with all costs associated with restoration and remediation of Plaintiffs' property;

III. For such reasonable attorney fees as may be authorized by the law of the State of Louisiana;

IV. For exemplary damages;

V. For all costs of this suit and for legal interest thereon from the date of the loss of each plaintiff and/or class member, or alternatively, from the date of judicial demand; and

VI. For all just and equitable relief.

By Attorneys:

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Supreme Court, U.S.
FILED
OCT 25 2002
CLERK

No. 02-478

IN THE

Supreme Court of the United States

NPC SERVICES, INC., EXXON MOBIL CORPORATION, UNITED STATES STEEL CORPORATION, DSM COPOLYMER, INC., SHELL CHEMICAL LP, CROMPTON MANUFACTURING COMPANY, INC., THE DOW CHEMICAL COMPANY, ETHYL CORPORATION, CELENESE AMERICAS CORPORATION, HONEYWELL INTERNATIONAL, INC., ROBERT G. BOLGER, J. W. STREET, and W. L. RAINEY,

Petitioners,

v.

MSOF CORPORATION and JAY PAUL LeBLANC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A. Can respondents' action filed in state court solely under state law causes of action be removed under the All Writs Act based on a consent decree previously issued by a federal district court to which respondents were not a party, does not addresses respondents' claims, and to which respondents' state action does not pose a threat?

B. Does federal question jurisdiction under CERCLA exist over an action filed by respondents in state court against some non-diverse parties where respondents can obtain complete relief under state law causes of action of trespass, negligence and nuisance for the toxic and/or chemical contamination to respondents' property?

STATEMENT PURSUANT TO RULE 29.6

Respondent, MSOF, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Summary of Argument	1
Reasons for Denying the Petition	3
A. The Fifth Circuit Properly Held That Removal Of This Action From State Court Was Not Warranted Under The All Writs Act	3
1. The All Writs Act is not an independent source of federal court jurisdiction	3
2. The MSOF action does not conflict with the Consent Decree	7
3. The MSOF property is not within the CERCLA cleanup area delineated in the Consent Decree	9
4. MSOF was not party to the Consent Decree	9

Contents

Page

B. MSOF's Action Does Not Raise A Federal Question 10

1. MSOF may obtain complete relief under Louisiana state law causes of action and federal question jurisdiction does not exist 11

2. CERCLA does not preempt state tort law relating to toxic contamination 15

3. MSOF's action is not a challenge to a CERCLA cleanup 17

Conclusion 19

Appendix — Excerpts From Consent Decree, Dated February 6, 1984 Issued In *United States v. Petro-Processors Of Louisiana, Inc., et al.*, Civil Action No. 80-358-B, United States District Court, Middle District Of Louisiana 1a

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Page

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	Page
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Statutes:	
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Cited Authorities

	Page
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28 U.S.C. § 1441	3
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SUMMARY OF ARGUMENT

This case concerns the principle of federalism, which serves to ensure that the limited jurisdiction of federal courts does not improperly invade the jurisdiction of state courts.

Respondents, MSOF and Jay Paul LeBlanc (collectively "MSOF"), filed this action in state court seeking damages for the contamination of its property from the toxic chemicals stored and released from the waste disposal sites located upstream from MSOF's property. MSOF sought relief and asserted causes of action solely under Louisiana state law. Petitioners (collectively "the NPC Defendants") removed the action from state court asserting that the federal court had jurisdiction over the matter under the All Writs Act, 28 U.S.C. § 1651, and that federal question jurisdiction was present under 42 U.S.C. § 9613(b) of the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601, *et seq.*

The NPC Defendants contend that the federal court had jurisdiction over this matter under the All Writs Act because the MSOF action conflicted with a consent decree previously issued in *United States v. Petro-Processors of Louisiana, Inc., et al.*, Civil Action No. 80-358-B, United States District Court, Middle District of Louisiana ("PPI Litigation"). Petitioners' Brief, p. 7. In the PPI Litigation, the United States and other governmental parties filed suit in response to the release of toxic chemicals generated by many of the NPC Defendants, which were stored at waste sites ("PPI waste sites") operated by Petro-Processors of Louisiana, Inc. ("PPI"). On February 16, 1984, the parties to the PPI Litigation entered into a consent decree ("Consent Decree") to resolve the PPI Litigation. *See* Consent Decree, Petitioners'

Appendix, 23a-27a. The Consent Decree set forth a plan to contain and remediate the tons of volatile chemicals stored at PPI waste sites. Consent Decree, Paragraphs 5-6, Petitioners' Appendix, 24a-25a.

Some federal courts have held that the All Writs Act is not an independent source of removal jurisdiction, while others have interpreted the All Writs Act to permit the removal of a state court action when the state action presents a threat to a previously issued federal consent decree. If the All Writs Act is not an independent source of removal jurisdiction, removal of the MSOF action was improper. Even if the All Writs Act can support removal under extraordinary circumstances, the All Writs Act does not support removal of the MSOF action because MSOF's request for monetary damages does not conflict with the CERCLA cleanup of the PPI sites prescribed by the Consent Decree. Further, MSOF was not a party to the Consent Decree, the Consent Decree did not address the claims brought by MSOF in the state court action, and the Consent Decree did not concern the contamination of the MSOF property.

The NPC Defendants assert that MSOF's claims arise under CERCLA, thereby invoking the exclusive jurisdiction of the federal court under 42 U.S.C. § 9613(b). Petitioners' Brief, p. 9. However, MSOF may obtain complete relief under Louisiana state law actions of negligence, nuisance and trespass. MSOF's right to relief does not necessarily turn on the interpretation or application of any federal law. In addition, the MSOF action does not challenge the CERCLA cleanup of the PPI waste sites as MSOF only seeks monetary damages for the toxic contamination of its property and does not seek to alter the CERCLA cleanup. Therefore, federal question jurisdiction is lacking.

The Fifth Circuit held that the MSOF action filed in state court was improperly removed and that the federal district court did not have original jurisdiction under the All Writs Act or CERCLA. Petitioners' Appendix, 1a-12a. This holding is well-grounded in law and the present petition for writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

A. THE FIFTH CIRCUIT PROPERLY HELD THAT REMOVAL OF THIS ACTION FROM STATE COURT WAS NOT WARRANTED UNDER THE ALL WRITS ACT

1. The All Writs Act is not an independent source of federal court jurisdiction

Under 28 U.S.C. § 1441[1], an action may be removed only where the federal district court would have had original jurisdiction over that action. Removal jurisdiction raises significant federalism concerns, *see Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809, 106 S. Ct. 3229, 3233, 92 L. Ed. 2d 650 (1986); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28, 103 S. Ct. 2841,

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1. 28 U.S.C. § 1441(b) states:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

2846, 77 L. Ed. 2d 420 (1983), and federal courts must therefore strictly construe removal jurisdiction. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 107, 61 S. Ct. 868, 872, 85 L. Ed. 1214 (1941); Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper 14B Fed. Prac. & Proc. Juris. 3D § 3721 at 351-52 (2002).

The All Writs Act provides, in part, that, "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651. The plain and unambiguous language of 28 U.S.C. § 1651(a) does not confer original jurisdiction on the district courts. The All Writs Act merely allows federal courts "to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction **otherwise obtained**." *United States v. New York Telephone Co.*, 434 U.S. 159, 172, 98 S .Ct. 364, 372, 54 L. Ed. 2d 376 (1977) (emphasis added). As such, the All Writs Act does not enlarge jurisdiction. *Clinton v. Goldsmith*, 526 U.S. 529, 535, 119 S. Ct. 1538, 1542, 1143 L. Ed. 2d 720 (1999) *citing* Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, 16 Fed. Prac. & Proc. Juris. 2D § 3932, p. 470 (2d ed. 1996) ("The All Writs Act . . . is not an independent grant of appellate jurisdiction") and 19 J. Moore & G. Pratt, Moore's Federal Practice § 204.02[4] (3d ed. 1998) ("The All Writs Act cannot enlarge a court's jurisdiction").

The Ninth, Tenth, and Eleventh Circuits hold that the All Writs Act does not create an independent source of subject-matter jurisdiction that would expand removal jurisdiction. *Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 937 (9th Cir. 1993); *Hillman v. Webley*, 115 F.3d 1461, 1469 (10th Cir. 1997); and *Henson*

v. Ciba-Geigy Corp., 261 F.3d 1065, 1070 (11th Cir. 2001), *cert. granted sub nom. Syngenta Crop Protection v. Henson*, 122 S. Ct. 1062 (2002). The Fifth Circuit has also expressed doubt "that All Writs Act removal [is] proper even in the face of extraordinary circumstances." *Texas v. Real Parties in Interest*, 259 F.3d 387, 394 (5th Cir. 2001), *cert. denied sub nom Umphrey v. Texas*, 122 S. Ct. 924 (2002). These concerns are well-placed.

The use of the removal jurisdiction under the All Writs Act has recently received scholarly review and criticism. *See, e.g.*, Lonny S. Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. Pa. L. Rev. 401 (1999); Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. Rev. 773 (2000). These scholars have questioned the efficacy of the recent discovery and use of removal jurisdiction under the All Writs Act, passed in 1789.

As Professor Hoffman noted: "From 1789 to 1987, no court had ever ruled by reported decision that the All Writs Act could serve as an independent basis for removal." Hoffman, 148 U. Pa. L. Rev., p. 413. Professor Hoffman further states:

> Federal courts are courts of limited jurisdiction because they cannot assume jurisdiction over a particular controversy unless it comes within Article III of the Constitution *and* a specific statute permits them to exercise jurisdiction. However, Congress has never authorized such an expansive grant of jurisdiction to the federal courts through the All Writs Act. Consequently, broadening removal jurisdiction in this fashion expands district court

> original jurisdiction beyond the maximum limits currently authorized by Congress.

Hoffman, 148 U. Pa. L. Rev. 401, pp. 404-405. These observations were echoed by Professor Steinman:

> [C]onsiderations of comity, requiring courts of one jurisdiction to forbear from interfering with courts of another jurisdiction, and of federalism, premised on the notion that federal courts must respect the independent sovereignty of state courts, dictate that the federal courts should not loosely interpret the All Writs Act to permit removal of actions from state court. 'Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts,' unless their injunction is warranted under the [Anti-Injunction Act] and, in that circumstance, injunction rather than removal usually, if not always, should be ordered.

Steinman, 80 B.U. L. Rev. 773, 815-816 [citations omitted]. The plain language and historical use of the All Writs Act support the Eleventh Circuit's position that the All Writs Act is not "jurisdictional caulk" that can fill gaps in federal court authority. *Henson*, 261 F.3d at 1070. To interpret the All Writs Act to confer original jurisdiction on the federal courts would impermissibly expand the subject matter jurisdiction beyond the maximum limits authorized by Congress.

The All Writs Act is not an independent source of federal court jurisdiction and the state court action filed by MSOF against non-diverse defendants under Louisiana state law causes of action is not removable under the All Writs Act.

2. The MSOF action does not conflict with the Consent Decree

The NPC Defendants argue that the All Writs Act provides authority to remove MSOF's state court action to protect the Consent Decree issued in the prior PPI litigation and, in support, cite to cases rendered by the Second, Seventh and Eighth Circuits. Petitioners' Brief, p. 8. However, these courts have relied upon the All Writs Act for removal jurisdiction only in exceptional circumstances, to wit: Relitigation of issues by the same parties to previous federal cases, *e.g. Sable v. General Motors Corp.*, 90 F.3d 171, 174 (6th Cir. 1996)[2] and *Xiong v. Minnesota*, 195 F.3d 424, 427 (8th Cir. 1999); the subsequent litigation affects constitutional rights of parties to existing suits, *e.g. Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 863 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077, 109 S. Ct. 1527, 103 L. Ed. 2d 833 (1989); and where issues raised in state court could not be separated from relief ordered in consent decree, *e.g. United States v. City of New York*, 972 F.2d 464, 469 (2d Cir. 1992). None of these circumstances are present here, which distinguishes these cases from the case *sub judice*.

The NPC Defendants removed the MSOF action under the All Writs Act contending that the MSOF action "would (or at least possibly could) conflict" with the Consent Decree. Petitioners' Brief, p. 9. To the contrary, MSOF desires the attainment of the explicit objective of the Consent Decree—the protection of the public, including MSOF and its property, from the release of the toxic substances from the PPI waste

2. In *Sable*, the Sixth Circuit decided that federal jurisdiction existed over plaintiff's state law tort action because an element of the tort claim was defendants' breach of a duty created by federal law. *See Sable*, 90 F.3d at 174. No element of MSOF's state law claims is created by federal law.

sites "by the investigation, development, design and implementation of remedial and long-term monitoring programs for both [the PPI waste] sites . . ." Consent Decree, Paragraph 5, Appendix, 4a. A release of the toxic chemicals stored at the PPI waste sites onto MSOF's property located downstream would constitute a violation of the stated goal of the Consent Decree. The Fifth Circuit agreed stating: "If anything, the plaintiffs' suit is consistent with these objectives [of the Consent Decree], not at odds with them." Petitioners' Appendix, 11a.

In its state court action, MSOF seeks "compensatory damages in an amount to be proven at trial commensurate with the costs of restoration and remediation of [MSOF]'s property" and "exemplary damages." MSOF Petition, Prayer for Relief, Petitioners' Appendix, 33a. The award of even complete relief under Louisiana tort law as sought by MSOF would not frustrate the Consent Decree, as the award of monetary damages to MSOF would not impact or effect the implementation of the remediation plan called for in the Consent Decree. As the Fifth Circuit noted below, "the consent decree certainly does not expressly purport to authorize any contamination of plaintiffs' land or anything else plaintiffs complain of." Petitioners' Appendix, 11a. Therefore, the relief sought by MSOF does not affect, much less threaten, the integrity of the Consent Decree.

Even under the expansive interpretation of the All Writs Act approved in the Second, Seventh and Eighth Circuits, removal of the MSOF action under the All Writs Act is improper in this case because the MSOF action does not pose a threat to the integrity of the Consent Decree. Further, writs are "drastic" remedies which a court should invoke only in "extraordinary situations." *Kerr v. United States District Court*,

426 U.S. 394, 402, 96 S. Ct. 2119, 2123, 48 L. Ed. 2d 725 (1976). Therefore, the Fifth Circuit properly held, removal jurisdiction over this case is not appropriate under the All Writs Act. Petitioners' Appendix, 12a.

3. The MSOF property is not within the CERCLA cleanup area delineated in the Consent Decree

Under the terms of the Consent Decree, the defendant parties to the PPI Litigation agreed to remediate the PPI waste sites (the Brooklawn and Airline Highway sites), which are delineated in the Consent Decree. Consent Decree, Paragraphs 3 and 4, Appendix 3a. MSOF's property is not within the PPI waste sites defined in the Consent Decree. Therefore, the continuing jurisdiction of the district court over the PPI waste sites as set forth in the Consent Decree is limited to the PPI waste sites and does not include the MSOF property. Consent Decree, Paragraph 35, Petitioners' Appendix, 27a. The exercise of removal jurisdiction over the MSOF action under the All Writs Act would improperly extend the limited jurisdiction of the federal court through the Consent Decree to cover the MSOF property, an area outside the PPI waste sites. The Fifth Circuit was right not to countenance such an extension of jurisdiction.

4. MSOF was not party to the Consent Decree

The Consent Decree settled the PPI Litigation as to the parties to that litigation. Claims of non-parties to the Consent Decree concerning the release of the toxic substances stored at the PPI waste sites were expressly preserved and not released by the Consent Decree, which provides: "[i]t is not the purpose of this agreement nor the intention of the parties to release any other persons or entities not parties to this

Consent Decree from any claims or liabilities, the right to pursue which is expressly reserved." Consent Decree, Paragraph 29, Appendix 4a. MSOF was not party to the PPI Litigation or the Consent Decree and MSOF's right to bring these state law claims against the NPC Defendants was not limited or extinguished thereunder, nor are MSOF's claims subject to the federal court's jurisdiction under the Consent Decree.

B. MSOF'S ACTION DOES NOT RAISE A FEDERAL QUESTION

Absent diversity of citizenship, as in this case, federal-question jurisdiction is required, *i.e.* "civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal courts have jurisdiction to hear, originally or by removal, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action, or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28, 103 S. Ct. 2841, 2856, 77 L. Ed. 2d 420 (1983). MSOF does not seek relief under any federal law nor does MSOF's right to relief under state law necessarily depend on a substantial question of federal law. Therefore, federal question jurisdiction is lacking over the MSOF action.

1. MSOF may obtain complete relief under Louisiana state law causes of action and federal question jurisdiction does not exist

MSOF's state court petition alleged that toxic chemicals from the PPI waste sites contaminated its land and sought relief solely under negligent and strict liability torts pursuant to Louisiana state law—La. Civ. Code arts. 2315[3], 2317[4], and 667[5], which encompass the doctrines of negligence, trespass and nuisance. MSOF Petition, Paragraph 23, Petitioners' Appendix, page 31a. In its prayer for relief, MSOF seek "compensatory damages in an amount to be proven at trial commensurate with the costs of restoration and remediation of [MSOF]'s property" and "exemplary damages" from the NPC Defendants for their mishandling of hazardous substances. MSOF Petition, Prayer for Relief, Petitioners' Appendix, Page 33a.

It is well settled where a plaintiff has available both a state and a federal cause of action, the plaintiff "may avoid federal jurisdiction by exclusive reliance on state law," as

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3. La. Civ. Code art. 2315 provides: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

4. La. Civ. Code art. 2317, in pertinent part, provides: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody."

5. La. Civ. Code art. 667, in pertinent part, provides: "Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."

MSOF has done in this case. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 2429, 96 L. Ed. 2d 318 (1987). MSOF has not sought relief under any federal statute or law and has elected to proceed exclusively pursuant to state law.

In *McCastle v. Rollins Environmental Services*, 514 F. Supp. 936 (M.D. La. 1981), plaintiffs brought a class action in state court against a hazardous waste disposal facility claiming that defendant had released chemical fumes and odors, which constituted a nuisance under Louisiana state law. The plaintiffs prayed for monetary damages and for injunctive relief, including closure of the facility. The defendant claimed that plaintiffs alleged a cause of action under the Resource Conservation and Recovery Act (RCRA) and, therefore, was founded upon a claim "arising under the Constitution, treaties or laws of the United States" which permitted removal of the action to federal court.

The court found no basis for removal jurisdiction of the plaintiffs' action brought under Louisiana state law, stating:

> Louisiana has an existing comprehensive and sophisticated body of law relating to actions which result in injury or damage to one's neighbors. The Louisiana Civil Code provides a complete set of rules governing liability for actions between neighbors. Plaintiffs and defendant may obtain complete relief under state law in state court. There is thus a forum available for resolution of this dispute other than federal common law, applied by a federal district court.

> As to overriding federal concern, the fact that the Comprehensive Environmental Response, Compensation and Liability Act of 1980 saves to plaintiffs their state law remedies for injury or damage caused by air pollution is an indication that the Congress has not concluded that there is an overriding federal concern in this area.

McCastle, 514 F. Supp. at 941.

Here, as in *McCastle*, MSOF has not sought relief under CERCLA, RCRA, or any other federal law. Under Louisiana state law, "[t]he *cost* of cleanup or removal of offending substances is an *element of damages* and, thus, part of the relief that may be obtained *if the cause of action is proved.*" *Mouton v. State*, 525 So. 2d 1136, 1143 (La. App. 1st Cir. 1988), *writ denied*, 526 So. 2d 1112 (La. 1988) (emphasis original). As the *Mouton* court makes clear, MSOF is entitled to the cost of cleanup and/or remediation as an element of monetary damages if MSOF establishes the causes of action under La. Civ. Code arts. 2315, 2317, and 667. Therefore, no essential element of the MSOF's causes of action arises under federal law. The Fifth Circuit followed the clear holding of *Mouton* and held that MSOF can obtain complete relief from the NPC Defendants under the Louisiana causes of action pled in its complaint. Petitioners' Appendix, 6a, *citing Mouton*, 525 So. 2d at 1143; La. Civ. Code arts. 2315, 2317, and 667.

As the Fifth Circuit properly noted, the only reference to federal law in the MSOF petition is an allegation that the PPI facility was maintained in violation of federal regulations *as well as* in violation of state and local regulations. Petitioners' Appendix, 6a. MSOF's allegation that the NPC

Defendants violated unenumerated federal regulations statutes does not constitute a request for a CERCLA remedy to provide basis for federal question jurisdiction, *e.g. Gray v. Murphy Oil USA, Inc.*, 874 F. Supp. 748, 755 (S.D. Miss. 1994); *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 918 (5th Cir. 2001). "[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 813, 106 S. Ct. 3229, 3234, 92 L. Ed. 2d 650 (1986). Therefore, the Fifth Circuit properly held that MSOF's claims do not necessarily turn on an application or interpretation of CERCLA and that federal question jurisdiction does not exist over this matter. Petitioners' Appendix, 9a.

To support their plea of federal question jurisdiction, the NPC Defendants have simply recharacterized MSOF's state law claims to be CERCLA claims. However, the "artful pleading" doctrine cannot be invoked by party attempting to justify removal on the basis of facts not alleged in the complaint. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 397, 107 S. Ct. 2425, 2432, 96 L. Ed. 2d 318 (1987). To hold otherwise would convert all state law causes of action concerning environmental or toxic torts into CERCLA claims despite the explicit terms and policy of CERCLA to the contrary.

2. CERCLA does not preempt state tort law relating to toxic contamination

The NPC Defendants argue that MSOF's claims arise under CERCLA and are subject to the exclusive jurisdiction of CERCLA under 42 U.S.C. § 9613(b)[6]. Petitioners' Brief, p. 9. This argument was properly rejected by the Fifth Circuit based upon the general savings clauses of CERCLA itself: "In enacting CERCLA, Congress expressly disclaimed an intent to preempt state tort liability for the release of hazardous substances. CERCLA contains a general saving clause and several section-specific saving clauses." Petitioners' Appendix, 6a-7a, *citing* to 42 U.S.C. § 9652(d)[7] and 42 U.S.C. § 9607(j)[8]. In addition,

6. 42 U.S.C. § 9613(b) provides: "the United States district courts shall have exclusive original jurisdiction over all controversies arising under [CERCLA], without regard to the citizenship of the parties or the amount in controversy."

7. 42 U.S.C. § 9652(d) provides:

> Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of this chapter shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.

8. 42 U.S.C. § 9607(j) provides:

> Recovery by any person . . . for response costs or damages resulting from a federally permitted release shall

(Cont'd)

liability under state law[9] and state tort law[10] concerning the release of hazardous substances are not affected by CERCLA. Therefore, Congress has expressed the clear intent that state law causes of action concerning toxic torts shall remain in effect.

Several circuit courts have held that Congress has made no attempt to pre-empt the field in areas of CERCLA liability, *e.g. ARCO Environmental Remediation, L.L.C. v. Department of Health and Environmental Quality of Montana*, 213 F.3d 1108, 1114-1115 (9th Cir. 2000) ("CERCLA does not completely occupy the field of environmental regulation. Congress expressly declared that it had no intent to do so. . . . At best, CERCLA may provide a conflict preemption defense to [plaintiff's] state law claims."); *Bedford Affiliates v. Sills*, 156 F.3d 416, 426-427 (2d Cir. 1998) ("We conclude it was not part of the legislative purpose that CERCLA be a

(Cont'd)

> be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

9. 42 U.S.C. § 9614(a) provides: "Nothing in this Act shall be construed or interpreted as preempting, any state from imposing any additional liability or requirement with respect to the release of hazardous substances within each state."

10. 42 U.S.C. § 9672 provides: "Nothing in this subchapter shall be construed to affect either the tort law or the law governing the interpretation of insurance contracts of any State."

comprehensive regulatory scheme occupying the entire field of hazardous wastes, nor does CERCLA prevent the states from enacting laws to supplement federal measures relating to the cleanup of such wastes."); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 617 (7th Cir. 1998) (purpose of 42 U.S.C. § 9652(d) "is to preserve to victims of toxic wastes the other remedies they may have under federal and state law") and *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 125-26 (3d Cir. 1991) (In enacting CERCLA, Congress did not explicitly preempt all state law, nor did it create a comprehensive scheme of regulation leaving no room for supplementation.). Accordingly, CERCLA does not preempt MSOF's claims under Louisiana state law.

3. MSOF's action is not a challenge to a CERCLA cleanup

The NPC Defendants assert that MSOF has challenged the CERCLA cleanup of the PPI sites prescribed in the Consent Decree and, thus, is subject to the exclusive jurisdiction of the federal court under 42 U.S.C. § 9613(b). Petitioners' Brief, p. 10. In support, the NPC Defendants cite to a line of Ninth Circuit caselaw. *Id.* However, the Ninth Circuit has "found actions to challenge CERCLA cleanups where the plaintiff seeks to dictate specific remedial actions, to postpone the cleanup, to impose additional reporting requirements on the cleanup, or to alter the method and order of cleanup. *ARCO Environmental Remediation*, 213 F.3d at 1115 [citations omitted]. MSOF does not seek to alter cleanup requirements or environmental standards, nor does MSOF seek to terminate or delay the cleanup of the PPI sites. Therefore, the MSOF action does not constitute a "challenge" to the CERCLA cleanup of the PPI sites, even under analysis of *ARCO* and the line of Ninth Circuit cases cited by the NPC Defendants. As the Fifth Circuit found: "If anything, the plaintiffs' suit is consistent with these objectives [of the Consent Decree], not at odds with them." Petitioners' Appendix, 11a.

The NPC Defendants contend that MSOF's claims arise under federal law because the scope of what is authorized under CERCLA and the Consent Decree may limit the defendants' obligations to MSOF. It is well established there is no federal question jurisdiction when "federal law becomes relevant only by way of a defense to an obligation created entirely by state law, and then only if [the plaintiff] has made out a valid claim for relief under state law." *Franchise Tax Board*, 103 S. Ct. at 2848. The federal question on which jurisdiction is based must be invoked as part of the plaintiff's claim rather than in anticipation of a defense. *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475, 118 S. Ct. 921, 925, 139 L. Ed. 2d 912 (1998). Therefore, the "artful pleading" doctrine is inapplicable to MSOF's state court action.

The Fifth Circuit properly held below "that neither CERCLA nor the mere existence of the federal consent decree creates federal 'arising under' jurisdiction in this case." Petitioners' Appendix, 9a.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari filed by the NPC Defendants.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTS FROM CONSENT DECREE, DATED FEBRUARY 6, 1984 ISSUED IN *UNITED STATES v. PETRO-PROCESSORS OF LOUISIANA, INC., et al.*, CIVIL ACTION NO. 80-358-B, UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 80-358-B

UNITED STATES OF AMERICA,

Plaintiff

VERSUS

PETRO PROCESSORS OF LOUISIANA, INC.; UNITED STATES STEEL CORP.; COPOLYMER RUBBER AND CHEMICAL CORP.; UNIROYAL, INC.; ETHYL CORP.; DOW CHEMICAL CO.; SHELL OIL COMPANY; AMERICAN HOECHST CORP.; EXXON CORP.; EXXON CHEMICAL CO.; ALLIED CHEMICAL CORP.; RUBICON CHEMICALS CORP.

Defendants

AND

STATE OF LOUISIANA
CITY OF BATON ROUGE, AND
PARISH OF EAST BATON ROUGE,

Intervenors

Appendix

CONSENT DECREE

Plaintiffs, United States of America (United States), on behalf of the Administrator of the United States Environmental Protection Agency (EPA), Intervenor Plaintiffs, State of Louisiana (Louisiana) and the City of Baton Rouge (Baton Rouge), hereafter collectively referred to as "Plaintiffs," and certain of the Defendants, United States Steel Corporation, Copolymer Rubber and Chemical Corporation, Uniroyal, Inc., The Dow Chemical Co., Ethyl Corp., Shell Oil Company, American Hoechst Corp., Exxon Corporation, Allied Corporation, and Rubicon Chemicals, Inc., (collectively "Industry Defendants") have each agreed to the making and entry of this Consent Decree ("Decree") prior to completion of trial and without any admission of liability or fault as to any allegation or matter arising out of the pleadings of any party.

Each undersigned representative of the parties to this Consent Decree certifies that he or she is fully authorized to enter into the terms and conditions of this Decree and to execute and legally bind such party to this document.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED:

* * *

Appendix

3.

The Brooklawn site is located just south of Brooklawn Road, about 5 miles north of Baton Rouge, and about 2 miles west of Highway 61, between Brooklawn Road and Bayou Baton Rouge, in East Baton Rouge Parish, Louisiana. The Brooklawn site consists of four generally identifiable areas of waste disposal and contamination: the Bluff Area, in the north-northeast portion of the site; the Cypress Swamp and Bayou Area and that area in the west-southwest portion of the site which includes contaminated sediments and soils in Bayou Baton Rouge and other property described in Attachment "A"; the Upper and Lower Lagoons Area in the south-central area of the site; and the Batture Area in the east portion of the site. The Brooklawn site, as used herein, shall also include any property used for construction of a landfill for solidified wastes pursuant to Paragraph 6 of this Decree.

4.

The Scenic Highway site is located about 5 miles from Baton Rouge, just west of Highway 61 and the Louisiana and Arkansas Railway right of way, about one mile north of the intersection of Highway 61 with Brooklawn Road, in East Baton Rouge Parish, Louisiana. The Scenic Highway site consists of two generally identifiable areas of waste disposal and contamination: the Bluff Area, the primary area of disposal; and the Batture Area, a relatively small area of waste burial to the west of the Bluff Area. The Scenic Highway site, as used herein, shall also include any property used for construction of a landfill for solidified waste pursuant to Paragraph 6 of this Decree.

Appendix

5.

The objectives of the parties, through entry of this Decree, are to protect public health and the environment from releases of hazardous wastes, solid wastes, hazardous substances and pollutants and contaminants (hereinafter collectively "wastes") from the Brooklawn and Scenic Highway sites, by the investigation, development, design and implementation of remedial and long-term monitoring programs for both sites by the Industry Defendants. The remedial programs shall employ sound scientific, engineering and construction practices.

* * *

29.

It is not the purpose of this agreement nor the intention of the parties to release any other persons or entities not parties to this Consent Decree from any claims or liabilities, the right to pursue which is expressly reserved. Industry Defendants reserve any rights they may have to intervene in any action brought by the Plaintiffs to recover funds expended by Industry Defendants for closure pursuant to this Decree.

* * *

Dated and entered this 16 day of February, 1984.

/s/ Frank J. Polozola
UNITED STATES DISTRICT JUDGE

Supreme Court U.S.
FILED
NOV 1 2002
OFFICE OF THE CLERK

No. 02-478

IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

NPC SERVICES INC., EXXON MOBIL CORPORATION, UNITED STATES STEEL CORPORATION, DSM COPOLYMER, INC., SHELL CHEMICAL LP, CROMPTON MANUFACTURING COMPANY, INC., THE DOW CHEMICAL COMPANY, ETHYL CORPORATION, CELANESE AMERICAS CORPORATION, HONEYWELL INTERNATIONAL INC., ROBERT G. BOLGER, J.W. STREET, AND W.L. RAINEY,

Petitioners,

v.

MSOF CORPORATION AND J. PAUL LEBLANC,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. The All Writs Act Issue Warrants A Hold for *Syngenta* 1

II. The CERCLA Issue Is Independently Certworthy Regardless Of The Resolution of the *Syngenta* Issue 3

CONCLUSION 5

TABLE OF AUTHORITIES

Cases **Page(s)**

Arco Envtl. Remediation, L.L.C. v. Department of Health & Envtl. Quality of Montana, 213 F.3d 1108 (9th Cir. 2000) 3-5

Bylinski v. City of Allen Park, 169 F.3d 1001 (6th Cir. 1999) 1

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) 2

Fort Ord Toxics Project, Inc. v. California EPA, 189 F.3d 828 (9th Cir. 1999) 3, 4

Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992) 2

Geier v. American Honda Motor Co., 529 U.S. 861 (2000) 2

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 2

NAACP v. Metropolitan Council, 144 F.3d 1168 (8th Cir. 1998) 1

Razore v. Tulalip Tribes of Washington, 66 F.3d 236 (9th Cir. 1995) 4

Sable v. General Motors Corp., 90 F.3d 171 (6th Cir. 1996) 1

Syngenta Crop Protection, Inc. v. Henson, No. 01-757, *cert. granted*, 122 S. Ct. 1062 (Feb. 19, 2002) 1, 3, 5

United States v. City of New York, 972 F.2d 464 (2d Cir. 1992) 1

Xiong v. Minnesota, 195 F.3d 424 (8th Cir. 1999) 1

Yonkers Racing Corp. v. City of Yonkers,
858 F.2d 855 (2d Cir. 1988) 1

I. The All Writs Act Issue Warrants A Hold for *Syngenta*.

The first question presented by the petition—whether, and under what circumstances, the All Writs Act authorizes removal of state-law claims that threaten the integrity of an existing federal judgment—is the very issue presented in the *Syngenta* case argued in this Court on October 15, 2002. *See Syngenta Crop Protection, Inc. v. Henson*, No. 01-757, *cert. granted*, 122 S. Ct. 1062 (Feb. 19, 2002). Accordingly, at the very least, the Court should hold this petition pending the resolution of *Syngenta*.

Respondents do not deny that this issue is currently pending before the Court in *Syngenta*. Rather, they simply argue the merits of their position that the All Writs Act provides no basis for federal removal jurisdiction. Opp. 3-6. Those arguments, however, are misplaced. This Court's forthcoming decision in *Syngenta* will resolve the point one way or the other. The only issue raised by the first question presented is whether to hold this petition pending the resolution of *Syngenta*.

Respondents suggest that such a hold is unwarranted because "[e]ven under the expansive interpretation of the All Writs Act approved in the Second, Seventh [*sic*] and Eighth Circuits, removal of the MSOF action under the All Writs Act is improper in this case because the MSOF action does not pose a threat to the integrity of the Consent Decree." Opp. 8. That suggestion is baseless. As explained in the petition, the Second, Sixth, and Eighth Circuits have held that the All Writs Act allows defendants "to protect federal consent judgments by removing potentially inconsistent state law claims to federal court." *Sable v. General Motors Corp.*, 90 F.3d 171, 175 (6th Cir. 1996) (citing *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 864 (2d Cir. 1988)); *see also Xiong v. Minnesota*, 195 F.3d 424, 427 (8th Cir. 1999); *Bylinski v. City of Allen Park*, 169 F.3d 1001, 1002-03 (6th Cir. 1999); *NAACP v. Metropolitan Council*, 144 F.3d 1168, 1170-71 (8th Cir. 1998); *United States v. City of New York*, 972 F.2d 464, 469 (2d Cir. 1992).

Respondents attempt to distinguish these cases by simply denying the possibility of any conflict between the remedy they are seeking in state court and the remedial scheme established by the federal consent decree. *See* Opp. 7-8. According to respondents, "MSOF desires the attainment of the explicit objective of the Consent Decree—the protection of the public, *including MSOF and its property*, from the release of the toxic substances from the PPI waste sites . . . ." *Id.* (emphasis added). Under this simplistic view, there can be no conflict between state and federal remedies as long as they both share the common objective of protecting nearby property owners from environmental contamination.

That position has no basis in law or logic. To the contrary, this Court has emphasized that a conflict can arise where, as here, state law is invoked as a source of different and/or additional remedies than those provided by federal law. *See, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 379-80 (2000); *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992). Respondents' assertion that "the award of monetary damages to MSOF would not impact or effect [*sic*] the implementation of the remediation plan called for in the Consent Decree," Opp. 8, is preposterous: respondents are seeking monetary damages (both compensatory and punitive) under state law based on contamination alleged to have occurred *under the federal consent decree* over the past two decades. *See* Pet. App. 29a-30a (charging petitioners with having allowed toxic substances to escape from the site "[o]n numerous occasions" and "on a continuing basis"). It goes without saying that the imposition of monetary damages for conduct carried out pursuant to a federal consent decree would conflict with the remedial scheme established by that decree. *See, e.g., Geier v. American Honda*

Motor Co., 529 U.S. 861, 881-82 (2000); *International Paper Co. v. Ouellette*, 479 U.S. 481, 494-95 (1987).*

In any event, this petition is not the proper vehicle for definitively resolving the dispute over the relationship between respondents' state claims and the federal consent decree. If this Court were to uphold removal under the All Writs Act in *Syngenta*, it would be entirely appropriate to grant this petition, vacate the judgment, and remand to the Fifth Circuit for reconsideration in light of that decision. There is simply no basis for this Court to tip its hand in *Syngenta* by disposing of this petition prior to resolution of that case.

II. The CERCLA Issue Is Independently Certworthy Regardless Of The Resolution of the *Syngenta* Issue.

Wholly apart from the *Syngenta* issue involving federal jurisdiction under the All Writs Act, this petition presents a certworthy issue involving federal jurisdiction under CERCLA. As noted in the petition, the Fifth Circuit's holding that respondents' ostensible state-law claims do not present a federal question conflicts directly with a line of cases from the Ninth Circuit holding that ostensible state-law claims that challenge the adequacy of a CERCLA cleanup thereby "arise under" CERCLA, and present a federal question. *See* Pet. 10-11 (citing *Arco Envtl. Remediation, L.L.C. v. Department of*

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* Respondents further suggest that their state action could not conflict with the federal consent decree because (1) "MSOF's property is not within the PPI waste sites defined in the Consent Decree," and (2) "MSOF was not party to the Consent Decree." Opp. 9. Both suggestions miss the mark. The fact that respondents' property is not within the actual waste sites is wholly irrelevant because (as respondents themselves concede) an "explicit objective of the Consent Decree" was "the protection of the public, *including MSOF and its property*, from the release of the toxic substances *from* the PPI waste sites . . . ." *Id.* at 7-8 (emphasis added). And the fact that respondents are not parties to the consent decree is similarly irrelevant: whether the remedy respondents are seeking in state court conflicts with the remedial scheme established by the federal consent decree has nothing to do with the identity of the parties to that decree.

Health & Envtl. Quality of Montana, 213 F.3d 1108, 1115 (9th Cir. 2000); *Fort Ord Toxics Project, Inc. v. California EPA*, 189 F.3d 828, 832 (9th Cir. 1999); *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 239 (9th Cir. 1995)).

Respondents seek to distinguish this line of cases by asserting that their state-court action "is not a challenge to a CERCLA cleanup." Opp. 17. That assertion does not pass the straight-face test. As noted above, respondents are seeking monetary damages (compensatory and punitive) in state court for contamination alleged to have occurred *under the federal consent decree* over the past two decades. Indeed, petitioner NPC Services, Inc., is the very entity established pursuant to the consent decree to undertake the CERCLA cleanup. Accordingly, respondents' claims are logically premised on the inadequacy of the federal CERCLA cleanup: respondents *would have no such claims* if petitioners' remedial efforts under CERCLA were adequate.

Contrary to respondents' assertion, thus, their claims manifestly *do* challenge a CERCLA cleanup under the standards applied by the Ninth Circuit. The Ninth Circuit has described such a challenge in the broadest of terms, holding that "[a]n action constitutes a challenge to a CERCLA cleanup 'if it is related to the goals of the cleanup.'" *Arco*, 213 F.3d at 1115 (quoting *Razore*, 66 F.3d at 239). As noted above, respondents are invoking state law in an effort to impose environmental standards more stringent than those imposed under CERCLA. Their claims therefore cannot remotely be characterized as "'unrelated to disputes over environmental standards.'" *Arco*, 213 F.3d at 1115 (quoting *Fort Ord*, 189 F.3d at 831); *cf. Ouellette*, 479 U.S. at 494-95 (state nuisance action challenging discharge of pollutants conflicts with federal environmental law establishing a permit system for such discharge). Because the Ninth Circuit has "found actions to challenge CERCLA cleanups where the plaintiff seeks to dictate specific remedial actions, to postpone the cleanup, to impose additional reporting requirements on the cleanup, or to

terminate the [Remedial Investigation/Feasibility Study] and alter the method and order of cleanup," *Arco*, 213 F.3d at 1115 (citations omitted), the ostensible state-law claims at issue here necessarily challenge the adequacy of a CERCLA cleanup under the Ninth Circuit standard, and thus would give rise to federal-question jurisdiction in the Ninth Circuit. By holding that respondents' claims did not present a federal question under CERCLA, thus, the Fifth Circuit created a circuit conflict on this important issue of federal jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari or, in the alternative, hold this case pending disposition of *Syngenta*.

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November 1, 2002